

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2010 JAN 13 AM 11:00

IN AND FOR THE COUNTY OF YAVAPAI
JEANNE HICKS, CLERK

BY: S Smisko

THE STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.)
)
STEVEN CARROLL DEMOCKER,)
)
Defendant.)
)

1300
No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
WEDNESDAY, DECEMBER 9, 2009
1:28 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON JURY SELECTION

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

DECEMBER 9, 2009
1:28 P.M.

HEARING ON JURY SELECTION

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND, MS. ANN CHAPMAN, AND MR. JOE GUASTAFERRO.

THE COURT: This is in State versus DeMocker,
CR 2008-1339. Mr. Hammond and Mr. Sears here with
Mr. DeMocker, who is present. Mr. Butner for the State.

I did issue a ruling on Chronis. I still
owe you a ruling on the motion to suppress that I haven't
issued yet.

I received a transmission e-mail from
Mr. Hammond on the 4th, is when that came in, and the hard
copy came yesterday -- maybe the day before -- and then day
before yesterday, I received a motion that seems to pertain
to the same issues that the e-mail is talking about.

What I had scheduled, when we last met,
was a hearing to discuss jury selection process. Obviously,
some of that may still have to do with some of the motions
that are still pending, but any particular order that you
wanted to take these in, Mr. Sears?

MR. SEARS: Judge, we are here today primarily
to talk about jury issues, particularly in view of your
Chronis ruling last evening, that tells us that this case is

1 going to go forward as a capital case.

2 THE COURT: Based on the Chronis issues.

3 MR. SEARS: Yes. We brought with us our
4 colleague Joe Guastaferrero, from Atlanta, who is our jury
5 consultant here, who has been helping us put together a
6 presentation to make to you today and next week, as well, on
7 these issues, and I have an overview that I would like to
8 talk about.

9 These other issues regarding disclosure
10 and related matters that are subject to Mr. Hammond's
11 letters. These motions are very important issues to us. I
12 am sure the Court has noticed that we have raised similar
13 concerns about some of these things pretty consistently over
14 time.

15 But today I would really like to focus,
16 if we could, first, on the jury issues. And if we had some
17 time at the end of the day and the Court was so inclined, we
18 could certainly talk about some of those other issues.

19 But particularly since we brought Joe
20 Guastaferrero here today, I think it would be a good use for
21 our time to talk about the jury selection process as it
22 applies in the case.

23 THE COURT: Let's move on in that area, then.
24 I need to talk to you, Mr. Butner, then, about the timing of
25 what we are going to do next week, possibly, and any --

1 MR. SEARS: Has your schedule changed again?

2 THE COURT: -- other schedule.

3 No, I have -- I still have the things
4 that were set for most of the afternoon on the 15th and
5 haven't been able to move those around.

6 On the other hand, I do have some time
7 available, if you wanted to just forget the 15th and move
8 everything to the Friday. I don't remember what your
9 schedule was.

10 MR. SEARS: Is that the 17th? Wednesday is
11 the 15th. Friday would be the 17th.

12 THE COURT: Yes. No. 18th.

13 MR. SEARS: Tuesday the 15th.

14 THE COURT: Yeah. I do have time on the -- on
15 actually the 17th or the 18th, I think.

16 MR. SEARS: I can certainly be available on
17 either of those days. I have to see what Mr. Hammond --

18 THE COURT: We can discuss that.

19 MR. SEARS: We might need to make a call or
20 two to be clear about that. I don't know what Mr. Butner's
21 world is like -- actually, yes, I do. I just don't want to
22 be in it.

23 THE COURT: Mr. Butner, is it okay if we just
24 go ahead at this point with the jury issues?

25 MR. BUTNER: I figured that is what we would

1 do, Judge. Just looking at the rules and kind of getting
2 ready to start.

3 THE COURT: Okay.

4 Mr. Sears.

5 MR. SEARS: Judge, let me take a minute, if I
6 could, and sort of explain the process that we have gone
7 through on our side to come up with what we think is a good
8 plan for the whole jury selection process, and it begins with
9 the sort of collective experience of Mr. Hammond and Miss
10 Chapman and I, and then welded onto that is the considerable
11 experience of Mr. Guastaferrero in jury selection in state and
12 federal capital cases all over the country -- very
13 high-profile cases and a number of other cases in different
14 states and state courts in his collective experience.

15 And what we have tried to do is to
16 develop a plan for the Court to consider adopting that is
17 respectful of the Court's time. And in order to be
18 respectful of Court's time in the jury selection process, we
19 have in mind asking the Court to consider adopting some
20 portions of this plan that we have used ourselves in other
21 cases in other courts that involve a degree of cooperation
22 and good faith between the prosecution and the defense in the
23 jury selection process in work that can be done outside of
24 the court setting that would not require court time and the
25 Court's actual time.

1 And then at the same time, we are trying
2 to develop a plan that is respectful to jurors' time. One of
3 things that all of us know from years of doing this, on all
4 sides of this case, is that the jury selection process,
5 particularly in a long jury selection process, can be very
6 unfair to potential jurors. They are kept waiting for long
7 periods of time without much information or explanation.
8 Then there is a little burst of activity and then more
9 waiting around.

10 And so what we try to do is to use this
11 process in a way that minimizes the time that jurors will be
12 just sitting around doing nothing. And in addition to being
13 respectful of their time and not requiring the Court to
14 constantly run out and apologize to a group of jurors, which
15 I am sure the Court enjoys doing anyway, we try to develop a
16 process that also minimizes the time that large groups of
17 potential jurors are around, where the possibility of
18 improper conversations and speculation about the case would
19 take place -- what were you asked? What do they want to
20 know? What is this all about?

21 So that's been our overarching goal, how
22 we can make this process efficient and fair to the Court and
23 fair to jurors and get this job done. And what we have done
24 is develop a plan that has a couple of baseline assumptions
25 in it, that we think are important, and we are prepared to

1 talk to you about in detail today.

2 The first assumption is that we would use
3 a jury-screening questionnaire. Our collective experience
4 has been always the questionnaires were utilized, and we have
5 been involved in different kinds of cases, sometimes where
6 the Court has their own questionnaire and there is very
7 little input from the attorneys. We have also been involved
8 in cases where it's just the opposite where the
9 questionnaires are presented and the Court decides what
10 questionnaire will be given. But in all cases that we have
11 done, particularly the ones that have gone to trial, there
12 has been a screening questionnaire.

13 And then the second part of the list of
14 assumptions that we made is that the questionnaires would be
15 filled out here in the courthouse rather than mailed. We
16 have done it both ways. And while there are certain
17 positives to mailing them out, in terms of less burden on the
18 jurors, we think that, on balance, the benefit of having the
19 jurors come to the courthouse to fill out the questionnaires
20 clearly outweigh any benefit of them being able to do it by
21 mail.

22 I have actually been involved in a case
23 in which questionnaires were mailed out, where it seemed very
24 clear to all of us -- to the government, lawyers and the
25 judge and to us -- that people other than the jurors had

1 filled out the questionnaires. You could see different
2 handwriting, and the answers -- the tone of the answers and
3 the style didn't match up with the way the people answered
4 questions during the voir dire process.

5 And then the third assumption that we've
6 made is that once we have engaged in this comprehensive
7 narrowing and focusing process, beginning with the
8 questionnaire and leading up to the first day of actual jury
9 selection, we will have a group of jurors who could all
10 serve, who would be -- all would be eligible to serve, all of
11 them could serve, so that the questioning would be much more
12 focused, rather than the kind of questioning that sometimes
13 happens when you don't do this pre-jury-selection screening
14 where you spend a great deal of time asking jurors questions
15 that could have been dealt with in questionnaires and
16 otherwise in the process.

17 And we also have assumed that the Court
18 would permit individual voir dire of the jurors. And we have
19 found, and Mr. Guastafarro can tell you in considerable
20 detail in his experience, that that questioning actually
21 speeds up the jury selection process. It may be
22 counter-intuitive, but in reality, if you have engaged in
23 this sort of thoughtful pre-screening of jurors, by the time
24 you get to the individual voir dire, the number of questions
25 and the kind of questions that you would be asking the jurors

1 individually becomes more limited.

2 And that particularly in view of the
3 death penalty issues in this case, as well as the pretrial
4 publicity issues in this case, we think that individual voir
5 dire is the best way to get jurors to feel that they have a
6 degree of privacy, to feel that it is a relatively informal
7 process that encourages them to be open and candid. It frees
8 them from the group dynamic that we think is present, even
9 when you have small groups of two or three jurors that you
10 are talking to at a time.

11 And that the quality of answers that we
12 get is helpful to both sides -- it's not simply a benefit to
13 the defense, it is a benefit to the State in this case and
14 it's certainly a benefit to the Court in hearing from jurors
15 in an atmosphere in which they are far more likely to be open
16 and candid in the responses about some very delicate matters.

17 And a lot of very personal private
18 questions have to be asked in capital voir dire -- there is
19 no other way to do it -- about deeply held and sometimes very
20 personal beliefs of potential jurors. And the degree to
21 which they can answer those questions comfortably and
22 honestly, we think, is directly related to being allowed to
23 do that in private.

24 So that is sort of a general overview of
25 the process, Judge. And what we have actually done is to put

1 together a time table that begins with this process, and
2 we've applied some real-world dates starting with the trial
3 date and working backwards and forwards, to find a way to
4 pick the jury efficiently and fairly, again, trying to
5 respect the Court's time and respect the time of the jurors
6 in this process.

7 It involves a number of events that would
8 occur before the trial begins in May but also a number of
9 events that begin afterwards. And I would be happy to give
10 you an overview of that generally. I know Mr. Guastaferro is
11 prepared to tell you in considerable detail about it, but if
12 I could just give you a second to give you an overview of the
13 process and how we see it happening.

14 THE COURT: Before you do that, can I ask
15 Mr. Butner, in general, where he stands on this issue, or
16 have you all had some discussion?

17 MR. SEARS: Please. No.

18 THE COURT: Mr. Butner.

19 MR. BUTNER: Judge, I've tried a couple of
20 death penalty cases here in Yavapai County. And in both of
21 those cases -- and I am not saying I am absolutely opposed to
22 the questionnaire -- but in both of those cases, we did not
23 use the questionnaire. And I am not convinced that a
24 questionnaire is necessary in this case.

25 The Rule 18.5(d) -- I was just looking

1 for it -- specifically states: "The Court shall conduct a
2 thorough oral examination of prospective jurors."

3 And certainly, to some extent, any kind
4 of questionnaire is going to be duplicitous because of that.
5 So I just don't think it is absolutely necessary. Or if we
6 do have a jury questionnaire, I think that it should be
7 relatively simple and not broad-ranging, so to speak, but
8 confined to very basic information that will expedite the
9 jury selection process rather than complicate it.

10 THE COURT: Thank you. I wanted to have a
11 baseline of where were you standing.

12 Mr. Sears.

13 MR. SEARS: Let me speak to that, because that
14 really goes to the heart of one of our baseline assumptions
15 here. And put simply -- and I have been in cases, and I am
16 sure the Court was probably in cases when were you
17 practicing, where the judge may say, well, I could simply ask
18 or you could ask or two of us can ask the same questions
19 during voir dire in the questionnaire so, as Mr. Butner
20 suggested, why do we need both. Why it is duplicative.

21 What we are trying to accomplish with our
22 plan is to narrow and focus in this case. And while that may
23 be literally true, it would be the longest and most tedious
24 way to get the information out.

25 I tried a capital case in federal court

1 in 2003 where we took four weeks to pick the jury because we
2 had questionnaires in that case that were primarily the work
3 product of the judge, but there was no effort to cooperate
4 with the government in that case with the judge, so we simply
5 had the questionnaires as something to put in the juror
6 notebooks. But when we did the voir dire, we were going back
7 and asking jurors questions about things that we think -- as
8 I will be able to show you here in a bit -- we could have
9 resolved, to the point where we were bringing jurors in and
10 questioning them and then scratching our heads and saying why
11 are we doing this, this juror could have easily been excused
12 for some of the things that they said in their questionnaire
13 both about hardship, about their attitudes about the death
14 penalty and some other related matters.

15 So the idea of this is to do as much of
16 that work before the jury is brought in for actual voir dire,
17 to narrow and focus the people that are left in the process
18 to people who are eligible. Because as Mr. Guastaferrero tells
19 me constantly, you are much more likely to be to the point
20 when you are talking to a qualified juror, one who might
21 actually serve, as opposed to somebody that inevitably is
22 going to be excused for cause just as soon as you get to the
23 question that pops out on a questionnaire.

24 The kind of questionnaire that we would
25 want wouldn't be burdensome in terms of asking people endless

1 questions about their background. As a general rule, we are
2 less interested in what kind of car they drive or those kinds
3 of things, as we are about their attitudes about the
4 important issues in this case. And there are a lot of
5 important issues in this case that are peculiar to this case.

6 Of course the death penalty issues are
7 very important in understanding their attitudes about the
8 death penalty and punishment in general. But also their
9 attitude about some of the other issues in this case. About
10 allegations about Mr. DeMocker's personal life, his personal
11 behavior. About finances. About divorce. About some of the
12 other things that you have heard, now, ten days of testimony
13 about, that are going to be brought out at trial, and
14 attitudes about those things -- the preexisting attitudes are
15 the kinds of things that, in our experience, collectively
16 focuses the question, as opposed to opening up and
17 lengthening the question.

18 If you have a questionnaire for the juror
19 that has a particular series of attitudes, let's say, about
20 capital punishment, it is easier and more efficient to
21 question jurors from that as it is to go into the voir dire
22 process and say, "Well, tell me for the first time -- tell us
23 all for the first time what you think about the death penalty
24 and what you think about mitigation and what you think about
25 the timing of the death penalty and when you should start

1 considering those things."

2 So I think a questionnaire has precisely
3 that role in this case, which would be to narrow and focus
4 the inquiry, so that when we get to the actual voir dire, we
5 were talking to people who are likely to serve, and we are
6 talking to them about things about which we already know a
7 fair amount. So the length of the questionnaire can be kept
8 down if the questions are more focused.

9 But the questions that we would
10 submit -- and what we were thinking of is before next week's
11 presentation circulating to you and to Mr. Butner, a draft
12 questionnaire that we would propose that has those kinds of
13 questions.

14 Also, some important questions in this
15 case about pretrial publicity. This case has engendered a
16 fair amount of pretrial publicity and is likely to create
17 more pretrial publicity as we drive towards next May. So
18 those are things we want to know about sooner rather than
19 later to avoid last-minute menu motions that are not
20 necessary, based on things that come to our attention at the
21 eleventh hour.

22 There is nothing more frustrating to
23 everybody, I would think, than getting to the middle of jury
24 selection only to find that you are not going to be able to
25 seat a jury because of publicity. To the extent we can get

1 that information out from potential jurors and deal with it
2 now, the more likely we are to avoid that scenario.

3 So we have a strong feeling about
4 questionnaires, Judge. It is something we have used with
5 good results, and we find that in the end it becomes as
6 important to the prosecution as it does to the defense. For
7 example, some of the pretrial publicity in this case has been
8 openly critical of the County Attorney's Office and the
9 police in this case.

10 I don't propose to speak for Mr. Butner
11 in this, but I think if I were in his position, I would want
12 to know about what potential jurors think about my side of
13 the case. We tend to focus a lot on what they think of the
14 defendant and the crimes in question, but this is a case
15 where there has been a considerable amount of bad press
16 engendered toward the County Attorney, towards the
17 prosecution in this case. So I think a questionnaire that
18 deals openly with those issues would be helpful to both
19 sides.

20 This is what we are thinking, Judge, just
21 in broad terms about a schedule and how this would work. We
22 are looking at -- and this is a conversation that I had with
23 Margaret in the jury commissioner's office about response
24 rates. And she said, last week to me, that case against
25 case, when they send out the jury summons, they get about a

1 50-percent response rate on average on the Prescott side and
2 about a 55-percent response rate on the Verde side.

3 We think that a target number, given the
4 length of the trial, the seriousness of the trial, that fact
5 that it's a capital case, which is offputting to lots of
6 people, and because of the pretrial publicity, we think that
7 it would be appropriate to look at sending out about 450 jury
8 summonses. And we can talk some more today or next week or
9 both about whether we might want to consider using a Verde
10 jury or how to work some of those issues.

11 But we think that 450 jury summons sent
12 out should get us about 225 people coming in to answer the
13 questionnaires. And then what we thought made sense, and we
14 went down and took a peek again at the jury assembly room,
15 and I didn't count the chairs, but I think we can get 50
16 people at a time in the jury assembly room.

17 So what we proposed is starting a month
18 before trial, take four-and-a-half days -- we debated this
19 again this morning. We probably don't think bringing people
20 in on a Friday afternoon to do anything is likely to get much
21 of a response. So we had nine sessions, starting on a
22 Monday, morning and afternoon, Monday through Thursday, and
23 morning only on Friday, 50 potential jurors at a time coming
24 in to answer the questionnaires and doing it here and turning
25 in the questionnaires before they leave.

1 THE COURT: "Here" meaning in the courthouse?

2 MR. SEARS: Yeah, down in the jury assembly
3 room.

4 So the summons would tell them to appear.
5 We would have to create nine different summons. And we would
6 be happy to help the jury commissioner if they needed
7 leg-work to get that done. But the summons would have this
8 group arbitrarily broken down into -- or randomly broken down
9 into smaller groups of 50 to come in at a different time.

10 We thought probably it would make sense
11 to have the jury commissioner use their recorded information
12 hotline if any of that changed, and also to provide on the
13 summons a number people could call if they couldn't make a
14 particular day -- and there might be some ability to do some
15 swapping of days and times to get people in. But that would
16 be the target goal.

17 And what we are thinking is that from
18 that 225, we probably will need a panel of about roughly 125
19 or so to bring to court. So we started with 450 to get 225,
20 and then from the 225, we think something in the neighborhood
21 of 125 -- could be 150 -- probably shouldn't be much fewer
22 than 125 qualified eligible jurors.

23 Now, here's the process we had in mind.
24 On that Friday afternoon when all of the jurors came in, we
25 would hope that we could have copies of all the

1 questionnaires made available to Mr. Butner and to us so that
2 we could look at them over the weekend and for the next few
3 days. And then pick a date -- maybe the next Wednesday for
4 Mr. Butner and his staff and us to meet outside of court to
5 go over the questionnaires with lists.

6 And what we would propose -- this is the
7 first place where we think cooperation would be really
8 useful. In my history looking at questionnaires, there is
9 always a certain percentage of people that will say something
10 in a questionnaire that will, to any reasonable set of eyes,
11 make them clearly ineligible to serve -- hardship being one
12 of them. And we've thought about when this case is teed up
13 for trial. All of us, I'm sure, have the same experience.

14 When you start a trial in May and it is
15 going to go into the summer, you get family with children and
16 summer vacations that are scheduled to begin right after
17 school lets out. That is a big problem. You have different
18 day care issues in summer with kids out of school than you
19 have in the school year. That is a problem. And you have
20 the inevitable family vacation, grandchildren's graduation,
21 grandchildren's weddings -- they always seem to be in the
22 Midwest someplace -- that just create a special problem for
23 Yavapai County juries in the summer, but there is no way
24 around that.

25 But starting earlier rather than later to

1 weed those people out gives us all also some flexibility to
2 call more people, if we need more people, to come in and
3 answer questionnaires, if the hardship rate is higher than we
4 imagined it might be.

5 The next area would be pretrial publicity
6 and also attitudes about the death penalty. The Morgan
7 issues that are raised in the death penalty questions, if
8 properly written and presented, seem more and more to elicit
9 really polarized answers from people, where they are either
10 death-penalty absolutist -- the death penalty is the only
11 penalty in every case, it doesn't matter what the
12 circumstances are -- and then the people that will say, for
13 whatever reason, they would never vote for the death penalty.
14 You get the polar extremes.

15 I would hope that the State and the
16 defense in this case could quickly agree that when people
17 clearly and unambiguously express those kinds of attitudes,
18 it would be a waste of the Court's time to bring those people
19 in to see if they could be rehabilitated down off of those
20 points. There may be some people whose answers are open to
21 different interpretations, but my experience and the
22 experience collectively of those of us on the defense side
23 has been that there will just be a certain number of people
24 that will give us answers in a questionnaire -- in a good
25 questionnaire that will clearly exclude them from service.

1 And then the same thing for the pretrial
2 publicity. And by excluding the people in that way, we
3 minimize the possibility of taint -- bringing in people who
4 know about the case and have formed an opinion about the case
5 and bringing them into contact with other potential jurors
6 sitting in the jury selection.

7 In addition, if we do it this way, the
8 people are going to be occupied filling out the
9 questionnaires, and as soon as they are done, will be excused
10 for that day. So there will be minimal -- as in,
11 essentially, no sitting around time for those people during
12 that session.

13 So the next -- to talk about this
14 meeting, we would hope that from this list -- from the
15 collective lists that the State has and that we have, we
16 would be able to stipulate to a number of strikes for cause,
17 either for hardship or some attitude expressed about one of
18 the other issues in this case, that would narrow and focus
19 the group more.

20 And then we would probably need some of
21 the Court's time, but we think it could be informal. We
22 think it could be in the courtroom with the court reporter,
23 at a time that the Court can fit in, to address the groups
24 that -- I know -- sometime in April to fit in the jurors
25 about whom we can agree to strike.

1 So the more information we have going
2 into that process -- including information from the Court
3 about definitions of hardship.

4 You know, I've practiced in front of
5 judges in capital cases who have some pretty clear ideas
6 about what constitutes hardship. You know, a child at home
7 under the age of X is an automatic hardship excuse. People
8 who work for wages -- for hourly wages. People over a
9 certain age.

10 I don't know that any of that would
11 apply, but to the extent that we have some insight into the
12 Court's thinking about what might constitute a hardship, we
13 might be able to agree before we ever talk to you about some
14 hardship excuses, or at least propose people for hardship
15 excuses. Obviously, those would ultimately be the Court's.
16 But that would narrow down the group.

17 And then after this hearing in front of
18 the Court to deal with the rest of them, we would, I would
19 think, be down somewhere in the 125-to-150-juror range to
20 bring to court for the first day of jury selection. So what
21 we would do is be able to get a group of focused, eligible
22 jurors in court on the first day of trial, ready for focused
23 voir dire.

24 Now there are some details about some of
25 this, Judge. For example, we've thought about how to deal

1 with a judge-led orientation of the jurors in each of these
2 nine sessions, and we thought about videotape. We went
3 online and looked at the videotape that the Supreme Court
4 sends around that has Chief Justice Birch on it now that is
5 played for jurors. And we thought that maybe a videotape,
6 some brief in-person remarks, and then a brief videotape for
7 each of the sessions would minimize the times that the Court
8 would have to spend during that week of questionnaire filling
9 out with the jurors.

10 In addition, if we can get to a certain
11 number during the week -- there is no magic number here -- if
12 we can get -- and Mr. Guastaferro can explain this a little
13 more clearly than I can -- but we might be able to hit the
14 target number of jurors well before we get to Friday, in
15 which case the jurors that would come on, say, Thursday
16 morning and afternoon and Friday morning, could be told they
17 don't need to report. We might be able to hit that target
18 number early. In fact, we think it's quite likely that we
19 will do that, unless something happens between now and then
20 in the case that we haven't seen yet in terms of publicity or
21 some other twist or turn in this case.

22 So that is the process. And so when the
23 people come to court -- and then the next part of this is
24 fast-forward into May now, we would have them brought in, in
25 another set of smaller groups. And we have tossed around a

1 number of different group sizes, and the number we think that
2 is realistic is about 15 per day to come in.

3 And the idea here is that we are trying
4 to get 36, which would be 12 jurors, four alternates, and
5 then ten strikes per side. So the magic number for us is 36.
6 This is the place where I really think it is likely we can
7 proceed more quickly than you would think.

8 So if you do the math, and let's say we
9 had 150, and we were bringing in 15 a day, that's ten days.
10 But since we only need 36 that both sides agree upon in the
11 case to make the final strikes, when we reach 36, we can
12 quit.

13 And my experience has been -- and
14 Mr. Hammond and Mr. Guastaferrero and I have talked about this,
15 this morning, but we all have some version of the same
16 experience, which is if you do it a different way, if you
17 wait until the jury selection process starts to get
18 information about the jurors, you might see 15 a day,
19 generally less -- because you are doing voir dire on things
20 that could have been handled by questionnaire and by
21 stipulated strike -- you are going over that ground with
22 these people. And so you might see 15 a day, but at the end
23 of the week you might have three qualified jurors. I have
24 actually been in that situation.

25 We think doing it this way, with all this

1 frontloaded narrowing of these people, makes it likely that
2 we would be able to get to 36 well before we run out of
3 jurors in this case. Because we are trying to only bring
4 jurors who are at least, on the surface, eligible to serve in
5 this case and have not expressed some extreme position about
6 some issue that would cause them to be removed for cause
7 after some voir dire.

8 So, we think that -- we don't want to go
9 out on a limb and predict how many days it would take, but we
10 think the number of days doing it the way we are proposing
11 would be less than the number of days if we just start from
12 scratch on Day 1 with no preparatory work like we talked
13 about. So much of the work we are talking about is done by
14 the jury commissioner and the lawyers, a relatively minimal
15 amount by the Court.

16 But the net result is when we get into
17 the actual jury selection process on the first day of trial,
18 we were dealing with a much more focused and refined group of
19 jurors who are going to be asked a much more refined and
20 focused set of questions by the lawyers who have had plenty
21 of time to look at and identify and plan for the voir dire of
22 the jurors that are actually going to be called to court. So
23 that is the process that we think is appropriate.

24 There are some details. For example, we
25 think that there has to be another round of sort of

1 introductory remarks that the Court would have to make in
2 May, but I think those could also be done with some
3 videotaped comments to keep the Court from going crazy, doing
4 those day after day.

5 I have done it the other way. I've done
6 it with the judge coming in and giving the same talk to the
7 jurors over and over again. And by the however many days --
8 I think that case we took 16 days to pick the jury -- it was
9 mind-numbing. It was mind-numbing for the judge, and it was
10 mind-numbing for the lawyers. And now that I look back on
11 it, probably unnecessary. We just didn't need to do it that
12 way. We could have done it in a more efficient way.

13 The Judge in that case -- this was the
14 first capital case in federal court that had gone to trial
15 since reinstatement in 1994 -- and so there was no collective
16 knowledge that would refer you to cases going to trial in the
17 country, the judge thought we could do 50 a day; most days we
18 were doing seven or eight jurors. But I charge that
19 primarily to the lack of any meaningful pre-screening.

20 By comparison, Mr. Hammond and
21 Mr. Guastafarro and I were working on a much larger, more
22 complex multi-defendant case in federal court that was ready
23 to go to trial in early 2006, and in that case, the judge had
24 taken over the process, but we had the questionnaires and we
25 were getting the information in advance. We had proposed in

1 that case stipulated strikes, but the judge, who was the
2 eighth judge assigned to the case -- eighth different judges
3 we had in the case -- decided that she would take charge of
4 that process. And so she was making the hardship excuses on
5 her own. I think, looking back on that, it would have been
6 far easier and far better and far less time consuming if the
7 lawyers had made some effort to come up with a list of
8 stipulated challenges in advance.

9 So this plan that we have is a plan that
10 has some parts of it that we are very familiar with and then
11 some concepts that we think would be useful in this
12 particular case because of the particular issues that we
13 have.

14 We are prepared to answer any questions
15 that you have or respond to anything that Mr. Butner says
16 about any of the particular parts, but that is the framework
17 that we think makes the most sense for this particular case.
18 So if we begin in early April, we would end sometime, we
19 think, probably in mid-May with the jury seated in this case.

20 Would it be okay if Mr. Guastaferro, who
21 has been sitting on his hands listening to me mangle his
22 proposal, could make a few comments?

23 THE COURT: Yes.

24 MR. GUASTAFERRO: Thank you, Your Honor.

25 If I may, I would like to go back to the

1 issue of the questionnaire. The one word that has not come
2 up is the word "candor."

3 The research is out there, and research
4 shows that prospective jurors are much more candid in their
5 responses when they are alone with a piece of paper. Whether
6 they are sitting in the jury room or at their own kitchen
7 table, the responses that they get -- that we get are much
8 more revealing and, therefore, enable us to target
9 questioning even better.

10 And the word that Mr. Sears used that I
11 think -- a phrase that he used that I think is really crucial
12 to analyzing the whole process is "questioning jurors that
13 can actually serve." I have done numerous death penalty
14 cases where we come in cold. We don't see the jurors until
15 the first day of jury selection, and we start talking to
16 them.

17 And the process of getting them to
18 divulge the information is laborious. And then once they
19 have made the causeworthy comment, committing them to that
20 comment and not having them waffle and back off the statement
21 that they've made, and then moving forward with the cause
22 challenge, it could take 20 minutes per juror to just get
23 them to one point that is causeworthy.

24 If there is the cooperation that we
25 anticipate, pretrial, and both sides are operating in

1 completely good faith, and we eliminate jurors who are Morgan
2 questions -- whether they are absolutely anti death penalty
3 or absolutely pro death penalty -- if those jurors are not in
4 the pool, and we were talking to people who are -- to use --
5 for want of a better phrase, "death qualified," you know, in
6 terms of those issues, we can focus the questions and talk to
7 them about their honest responses from the questionnaire in a
8 much more targeted way.

9 The research is also out there on the
10 issue of what they call "norm formation" and "conformity
11 within a group." I mean, we have all seen it in a jury
12 selection where a well-intended attorney asks a juror a
13 question, and then bounces to the next juror, and that juror
14 says, "I agree with him," and we get no useful information
15 from that I-agree-with-him answer.

16 By having individual voir dire and a
17 focused questionnaire that we can use with the jurors' candid
18 responses, we are dealing with much more usable information
19 from that juror, and we are not fishing for it during the
20 process.

21 The idea of stipulating to jurors who are
22 not eligible to serve is where the timesaver is in the
23 individual voir dire because of the ability to talk to people
24 who can actually sit on a jury. And then something may come
25 up during that questioning, which would cause one of the

1 parties to move for cause against that person. But we are
2 not starting out knowing that this is a cause-eligible person
3 and we have got to lock them in or rehabilitate them.

4 Rehabilitation is the thing that I find
5 difficult to deal with and the jurors find it odious, because
6 we ask someone for their honest opinion, we tell them there
7 are no wrong or right answers, and then they tell us
8 something that they believe is honest, and the lawyers beat
9 the crap out of them for, you know, ten minutes, trying to
10 get them back or to change their mind, and the juror is
11 stuck. He says, "Well, you asked me for my honest answer,
12 and I gave it to you, and now you want me to go back on it
13 and change it." And the tension gets peculiar and I think
14 then we're getting even more distorted information from the
15 juror.

16 The research is also out there, Your
17 Honor, on how group voir dire in something as crucial as a
18 death penalty case is virtually meaningless in terms of the
19 jurors' responses. And even if we had groups of three, each
20 person would need to be asked the same questions to get their
21 individualized responses to those questions, and you end up
22 saving no more time than talking to them individually. But
23 you do save the juror the awkwardness of speaking in front of
24 the group. And if there is any strength to the individual
25 voir dire process, is that it removes that uncomfortableness

1 for the juror that takes forever to overcome in a crowded
2 courtroom. And they very quickly can start to speak more
3 candidly.

4 I was -- just did a death penalty case
5 down in Louisiana, and the federal judge allowed us to bring
6 a chair out into the well. And the juror sat in the well,
7 facing the counsel tables. And the questioning went back and
8 forth from table to table. And it was a very productive,
9 useful conversation of the juror's time.

10 So I just wanted to add those things to
11 what Mr. Sears has already outlined about our plan, and I am
12 happy to respond to any questions that what I said might have
13 generated.

14 MR. SEARS: I think that's generally what we
15 wanted to say. I would be interested in the Court's reaction
16 to some of this and also to Mr. Butner's reaction. And there
17 may be more we can bring to the table about some of the
18 individual pieces, but that is what we have in mind, Your
19 Honor. That is how we propose this to work.

20 THE COURT: I have had cases with
21 questionnaires. I have had cases without questionnaires.

22 I suspect your experience is similar,
23 Mr. Butner.

24 But I am not adamantly opposed, nor am I
25 adamantly in favor of questionnaires. I find they can be

1 helpful. It depends on how they are devised and implemented.

2 Mr. Butner.

3 MR. BUTNER: Judge, there are just some
4 assumptions made, and one of them that kind of jumped out at
5 me, and I have had an entirely different experience in that
6 regard, is that the issue of juror candor when they are alone
7 and in their kitchen and writing on paper or wherever.

8 It has been my experience that it is
9 easier to judge whether somebody is telling the truth or not
10 when you are actually able to see them and judge their
11 demeanor when they are answering questions. That applies --
12 I think that is just a general rule for criminal trials, much
13 less jury selection.

14 And I understand that -- it appears that
15 the defense wants to spend -- I don't know -- many, many
16 days, apparently, selecting a jury in this case. And it has
17 been my experience here in Yavapai County on a couple of
18 different occasions, and I am aware of other ones where I
19 wasn't a lawyer, that we selected a death penalty jury to
20 everybody's satisfaction, so to speak, in about a week and
21 did it in such a way that we didn't run into that norm
22 formation or group conformity issue.

23 And I just feel like we are overly
24 extending the process and overly complicating the process
25 already. And I mean, like Mr. Sears talks about starting in

1 April and fast-forwarding to May -- well, from what I hear,
2 there is no fast forward in any of this. And I am not saying
3 that speed is the goal here. It is not the goal.

4 But where the rule calls for the judge to
5 conduct a thorough, oral examination of prospective jurors --
6 and my understanding of that rule is because when you orally
7 examine somebody under oath, you are able to get your best
8 view of them and their truthfulness in answering the
9 question, as well as the best evidence of their attitudes.
10 And you don't get that from a paper questionnaire. You
11 simply don't get it.

12 We do have some pretrial publicity issues
13 in this case, you know, and I have had them in a couple of
14 cases that I tried, and I am sure they have been present in
15 lots of them in this court -- courthouse. I think that we
16 can handle these things in a fair and expeditious fashion
17 without inconveniencing jurors and bringing them in on
18 several different dates to fill out questionnaires, and then
19 come back, and go through all sorts of screening processes.
20 It just strikes me that we are needlessly complicating this.

21 This is Yavapai County. We've somehow
22 managed to get along here for a long time doing things in a
23 fairly simple and straightforward fashion, and that includes
24 death penalty cases all along the way. And my suggestion
25 would be that we try and opt for that where it's possible in

1 the jury selection process and not needlessly complicate it.

2 THE COURT: Thank you.

3 Mr. Sears.

4 MR. SEARS: Thank you. I am glad to hear
5 that, Your Honor. That tells me I need to do a little more
6 work here. Let me see if I can try to explain a little more
7 clearly what we are thinking of, starting with the
8 questionnaires.

9 The reason we think a questionnaire is
10 really important in this case is that a good questionnaire --
11 not a questionnaire that has a lot of check-the-box questions
12 and the kinds of questions that would be asked by the Court
13 in general voir dire -- you know, are you married to any of
14 the witnesses, have you been convicted of a felony -- but
15 questions that are more focused, and I think next week when
16 you see the questionnaire that we are thinking about, it will
17 be easier to understand the kinds of questions we want.

18 Looking for attitudes. We are looking
19 for attitudes from jurors because capital voir dire, whether
20 it is in Yavapai County or Atlanta or San Diego, wherever it
21 is, capital voir dire has evolved over time, just like the
22 practice of law in virtually every other area.

23 Capital voir dire has, as a result of the
24 United States Supreme Court jurisprudence in this area and
25 the Arizona jurisprudence, become a specialized kind of voir

1 dire that is different from the voir dire that you would
2 conduct in a non-capital case. It is about attitudes. It is
3 about people's attitudes about capital punishment in general,
4 about the process of capital litigation, the multi-step
5 multi-phase process that we have in place in Arizona, about
6 not forming opinions about guilt or innocence or about death
7 or life until it's time to do that and how to get that done.

8 And so when you get attitudinal questions
9 in a questionnaire, invariably, at least in our collective
10 experience and maybe the Court's experience, invariably you
11 will get jurors that will say that one way or the other --
12 one polar extreme or the other -- either they can tell you
13 right now there is absolutely no way under any circumstances
14 they would vote for the death penalty, for religious reasons
15 or personal reasons or some other reason, or alternatively,
16 if the person is convicted with murder, they will get the
17 death penalty for that juror, no matter what they are told to
18 do.

19 And so those people can be excluded, and
20 it's not an insignificant number. Those people can be weeded
21 out from the questionnaires, without having to inconvenience
22 them by having them brought to court in a much larger number
23 and kept waiting a much longer period of time, if we come in
24 cold, as Mr. Guastaferrero described.

25 In addition, one of the problems in a

1 lengthy trial starting in Yavapai County in the Spring and
2 going out into Summer is the specialized hardship issues.
3 Getting jurors excused for obvious either stipulated or
4 quickly resolved hardship issues is respectful of the jurors
5 and respectful of the Court's time, because it doesn't
6 require somebody to come in and sit for a couple of days,
7 sometimes, until they get an opportunity to say "I have
8 prepaid tickets to my grandson's college graduation at the
9 end of the month, and I'm not going to miss that." Everybody
10 would agree that person shouldn't be compelled to sit in this
11 case.

12 So rather than wasting time and rather
13 than duplicating efforts, it subtracts that time from the
14 in-court time-consuming time-wasting process if we were to go
15 without a questionnaire and hope that we would get that
16 information at a general voir dire. When you add to that
17 questionnaire, the meet-and-confer process, which I know
18 Mr. Butner would approach with an open mind and good faith --
19 I am absolutely convinced of that -- I believe that we would
20 be able to find another group of people, based on their
21 attitudes and their answers to the questionnaires, that we
22 could likely stipulate should be excused.

23 So you have the hardship people, people
24 who have formed an opinion because they know something about
25 the case or have expressed some opinion about it or have

1 heard something about it, and the people with extreme
2 attitudes, pro and con, regarding the death penalty, so that
3 when we come to the court the first time, pretrial, to
4 resolve the rest of the cause excuses at that point -- just
5 based on the questionnaire. Remember, we are just talking
6 now about cause as it rises on the base of the questionnaire.

7 The Court can say let's wait and see what
8 that person says when they come in. I can't find cause from
9 the questionnaire. You all can't stipulate it. I can't find
10 it. Okay. That person will come to court in May.

11 Or the Court may have a different view --
12 one side or the other may not be willing or able or narrow
13 minded to stipulate. But the Court may say that person is
14 never going to make it through voir dire. I am going to
15 excuse that person today for cause or for something they've
16 said in their questionnaire.

17 I think that is a very wise use of
18 resources. Most of the work is done by the jury
19 commissioners and the lawyers. The final piece of that is
20 done by the Court approving or disapproving the stipulated
21 strikes and making some additional strikes.

22 The jurors come in -- they come in in
23 April, they spend a period of time answering the
24 questionnaire. They are told that there will be information
25 available to them. When they are struck, they will be told

1 their services are no longer required. They will be
2 contacted.

3 So that when we get to May -- maybe
4 "fast-forward" was a bad phrase -- but when they come in May,
5 the group that comes in May is a leaner, meaner group of
6 people -- maybe "meaner" is a bad word -- they are a more
7 focused group of people, as Mr. Guastaferrero said several
8 times, eligible to serve. So that when we question those
9 people -- whether it is the good old-fashioned Yavapai County
10 way or some other way, when you question those people, the
11 questions will be questions not in a vacuum, trying to get
12 them to tell us finally what their position is, but we will
13 know what their position is, and they are questions designed
14 to understand their position and to see how firmly they
15 believe in their position.

16 Because we are going to be dealing with
17 people who don't express an extreme position. We're going to
18 be dealing with the people in the middle range, the people
19 that are death eligible for such a thing, under the case law,
20 but people about which we know something about, about their
21 attitude, so both sides can ask meaningful questions at that
22 point. That is more efficient.

23 And if we went in groups of two or three,
24 it doesn't go twice or three times as fast. My experience is
25 that -- just like Mr. Guastaferrero says -- you have to get

1 individualized answers from each of those people. There is a
2 group dynamic that slows that down. And if you have one
3 vocal, verbal person in the group of three, they're going to
4 dominate the conversation, and the less self-assured or less
5 verbal people are not likely to be as open if you were just
6 having a conversation with them.

7 One of the ways I've seen it done is to
8 make the courtroom a bit more informal. Maybe push the table
9 together and have the judge sit at a table. Maybe the judge
10 doesn't wear his robe.

11 Maybe instead of having the person in the
12 hot seat in the middle of the courtroom, which is the way
13 I've seen it done before -- last time I did it, the person
14 came in and sat in a jury box all by themselves in a big
15 empty federal courtroom and were asked questions, and I think
16 that was intimidating. I think there are better ways to do
17 that, that reflect the seriousness of the proceedings, but
18 the degree to which we want people to be open and feel
19 comfortable in their responses.

20 And then the actual jury selection
21 process, what we think of intuitively as the jury selection
22 process is limited to those days in court necessary to get to
23 36. And we think that can be done -- the more efficient we
24 are in the work we do before the first day of actual voir
25 dire, the less time it is going to take. And that's why we

1 emphasize that part of it.

2 It is not -- you know, once the jurors
3 come -- they come once for a couple of hours at most and fill
4 out a questionnaire, and then don't come back, if at all,
5 until jury selection time. I don't see that as a particular
6 burden when you compare it to the experience that we have all
7 had on one level or another of having a couple hundred people
8 milling around in the courthouse, talking to each other,
9 talking to the newspaper reporters, talking to the parties,
10 talking to who knows who about the case and all of those
11 issues that arise, which would be minimized, because when
12 they come to court -- remember phase whatever of our plan
13 is when they come to court for jury selection process, they
14 are coming at the rate of 15 a day, plus or minus.

15 And my experience is that could be
16 tweaked a little bit. If we are doing fine, we can call a
17 few more. If we're going a little slower, we can call a few
18 less. We can turn that spigot off more easily when we're
19 dealing with very small groups of people. That is going to
20 get us to 36 more efficiently than doing it in another way
21 with minimal information going in.

22 The middle ground, which is the ground
23 that I am most familiar with, is use the questionnaires as a
24 guide, but just have them as a guide, doesn't seem to speed
25 the process up, Judge. It really doesn't speed the process

1 up.

2 What really speeds the process up is
3 weeding out the clearly excludable people and the people the
4 Court feels are clearly excludable before you ever come to
5 court. And this is, I think, a smart way to get that done.
6 It allows us in an orderly way to get it done.

7 It also gives us some ideas. For
8 example, if we get back a couple of hundred questionnaires
9 and 80-percent of those people say I have read about this
10 case and express some opinion about the case, we may see a
11 venue problem coming into focus more clearly than if we are
12 in the midst of jury selection, particularly with a large
13 panel where somebody blurts out something and poisons the
14 panel to the point where they have to be excluded. This
15 minimizes the panel, because they are never all together in
16 one place. You don't have 125 or 150 jurors in the building
17 at any one time. So I think that's an important dynamic.

18 And the carefulness of that and the power
19 of that I think is very appropriate in a case like this with
20 a lot of hot-button issues out there for people that are
21 going to express opinions about. I suspect we are going to
22 get some pretty pointed views from jurors about a lot of the
23 issues that we would propose be covered in the questionnaire.

24 Finally, the last piece of this -- at
25 least from our perspective -- in response to Mr. Butner's

1 comments is somehow the idea that we are overcomplicating or
2 overextending the process. I think it's really just the
3 opposite.

4 I think what we are doing is a narrowing
5 that a good questionnaire, not a 500-question questionnaire,
6 but an appropriate questionnaire that the Court is
7 comfortable with, gets this information out. And as
8 Mr. Butner said, it's no substitute for face-to-face
9 questioning. But what it does is it allows people to think
10 in a reasonable way about some of these answers and commit
11 them to writing so that we can see them.

12 But what we are still saying is that
13 except for those people that commit to extreme positions or
14 come up with an obvious hardship excuse or make it clear that
15 they know a lot about the case and they follow it in the
16 press and have an opinion that they formed already in this
17 case, the rest of the people are going to be brought to court
18 for the kind of careful, appropriate questioning that
19 Mr. Butner supports, which is the idea that there is no
20 substitute for eyeballing a person to get a sense of their
21 real attitudes.

22 The difference between our proposal and I
23 think what I hear Mr. Butner suggesting is we are trying to
24 do that with people who are eligible to serve and do it in a
25 way where we already know something about what those people

1 think about the key issues in the case, so that the
2 questioning is respectful of their time, doesn't reinvent the
3 wheel, doesn't start with a blank slate, but it can be
4 focused on something that was said. And I have done capital
5 cases in state and federal court in a number of different
6 circumstances, but my experience has always been with a
7 questionnaire. Always been with a questionnaire.

8 But I think the way we are proposing to
9 use the questionnaire is the best way yet that I have seen,
10 which is to use the questionnaire, to get us into the jury
11 selection process long before the jurors ever come to court.
12 And I think Mr. Butner might be pleasantly surprised about
13 how efficient it will be and how much agreement there is
14 likely to be about both sides of this. Because the last
15 thing we want to do is waste a lot of time trying to keep
16 Mr. Butner from rehabilitating somebody at one end or trying
17 to grab somebody who is an absolutist, anti death penalty
18 back into the fold. It's never going to happen, in our
19 experience, for those people that express absolutist views,
20 and it's not something we want to spend our time doing.

21 We are much more interested in focusing
22 on the people who would be eligible to serve and really
23 understand their attitudes as much as the process will allow
24 us to do. And this is a way to get us to that point. But we
25 thought it was important to start talking about it now,

1 because there are a lot of pieces of that that are beyond our
2 control.

3 I suggested maybe someone from the jury
4 commissioner's office could be here to talk about this, and
5 that may be a good idea either later today -- I checked with
6 Margaret, she is available if the Court had any reason to
7 have her come up -- or next week -- to talk about the
8 mechanics of doing this.

9 But I think getting the people in here a
10 month in advance, fill out the questionnaires, get us the
11 questionnaires quickly, let us meet and confer, come to the
12 Court with stipulated strikes, ask the Court to resolve the
13 ones we couldn't agree to, and move on to the next phase,
14 three-plus weeks later, is a way to get through this process
15 more quickly.

16 THE COURT: General timeline. You are talking
17 about your initial draft of a questionnaire by next week
18 sometime?

19 MR. SEARS: Yes.

20 THE COURT: Any notion as to the length of
21 that, of what your draft is right now?

22 MR. GUASTAFERRO: At the moment, it is very
23 large. Probably about a hundred questions.

24 MR. SEARS: We are thinking maybe -- what we
25 are doing is we are pulling together topics, and then we go

1 through and prune it. It might be in the neighborhood of a
2 hundred questions, I think, when all is said and done or
3 less. It is larger than that now, but the one we are going
4 to give you is going to be less.

5 THE COURT: Obviously, you have to have name
6 and where they are from and that kind of stuff in there. But
7 the main issues that it would be seem to have some utility
8 for me would be with regard to publicity and the hardship
9 question, even absent anything regarding death penalty. But
10 those are two major issues based on what you all have told me
11 about your anticipated length of the trial and what we all
12 know has been a high-profile case, at least in this part of
13 the county. So those two issues and, obviously, the third is
14 the death penalty attitudes.

15 I don't know -- it takes a certain amount
16 of logistics that I don't have a lot of -- with regard to
17 time, with regard to just the simple copying off of the
18 responses and providing those to counsel. I have got a trial
19 schedule that is booked up -- inclusive of this, of course --
20 through July or August of next year. And my bailiff is
21 usually necessary for covering the cases that are going to
22 trial, but I still anticipate going to trial between now and
23 May 4.

24 At this point, I don't have a whole lot
25 of time to be able to do the sit down, meet with each group

1 of panel members, based on what things look like currently.
2 I have got trials right up to the week before this trial
3 starts.

4 Are you talking about, then, the
5 individual -- and some of that your proposal leaves me out
6 of, but I don't know what Mr. Butner's availability is --

7 MR. HAMMOND: Judge, can I offer a comment on
8 this? I think the way that it might work, particularly given
9 the Court's schedule, we think the first phase of this -- the
10 coming in and filling out the questionnaires -- could be done
11 without you having to be there at all.

12 THE COURT: I perceived that.

13 MR. HAMMOND: You can be handling your
14 business.

15 If things go well, as we have talked
16 about, it will take some of our time and Mr. Butner's time,
17 but then hopefully, sometime the following week there would
18 be maybe as little as one afternoon where we could sit down
19 with the Court, with the questionnaires that we think are
20 worthy of talking about, and go through those. And it might
21 be that in a couple of hours, one time, we could take care of
22 all of that. And then have at the end of that a list of, as
23 John said, maybe 125 questionnaires and not have any further
24 involvement of the Court on the jury selection issue until
25 the 4th of May.

1 MR. SEARS: And then I had a further idea. I
2 may have blurred a couple of concepts, but when we start the
3 jury process, rather than a big plenary session with all 125
4 people in one of the big courtrooms with all that stuff, what
5 we visualized was --

6 THE COURT: One of the big courtrooms.

7 MR. SEARS: One of the large courtrooms yet to
8 be built in Yavapai County.

9 I actually had a case where we -- we
10 settled the case. That is the one I was telling the Court
11 about, with Mr. Guastaferrero and Mr. Hammond. They were
12 actually remodeling the ceremonial courtroom in federal
13 court, sawing into the bench and stuff when the case settled.
14 And they were -- the most disappointed people were the people
15 that cut the courtroom into pieces ready to build this mega
16 courtroom when the case settled.

17 What we envision for the time of jury
18 selection beginning May 4, would be on May 4, 15 people come
19 to court, not 125.

20 THE COURT: If that is the case, then you are
21 roughly working them one per half hour, at least, or maybe
22 even a little bit shorter, one every 20 minutes.

23 MR. SEARS: That is doable. We think that is
24 doable.

25 Like everything else in life and

1 everything else in the court system, it depends on what you
2 get and what you see. But we have an interest in doing that
3 process as efficiently as we can, and so that time period for
4 us doesn't seem to be a problem.

5 You know, I think if you polled judges
6 that were doing it in some fashion similar to the one we are
7 describing, they would say that the 15 would be overly
8 optimistic, but I have seen instances where they can go a bit
9 further. It really just depends on what the jurors say.

10 But in that regard, the more we know
11 about those jurors, you know, that time doesn't change. If
12 you do it the old-fashioned way and bring everybody in and do
13 some kind of questioning, you are still going to ask the same
14 questions and you are still eventually going to have to get
15 all of the questions out there to all of the jurors about
16 those things. But you have a complicating and problematic
17 factor of this group dynamic, and if you are questioning
18 jurors in front of a 150 strangers, the problem becomes
19 exacerbated by a power of I don't know what.

20 The individual voir dire, when there's
21 not a hundred people sitting out in the courtroom, when
22 there's 14 other people. And you could even break that
23 down -- we got so that we would have a morning group and an
24 afternoon group. We had people coming in in the morning and
25 people coming in in the afternoon.

1 There are ways to minimize the time that the
2 people are just sitting around the courthouse, but it would
3 never be than more than a day. The fifteenth person, or
4 thereabouts, would never be asked to be here more than a day,
5 in general terms. Sometimes something happens, if there is
6 some emergency in the courthouse to do something or there is
7 some other emergency.

8 But the other thing that could be done is
9 to minimize the mind-numbing time. We think if we put our
10 heads together, we could come up with a video that could be
11 used in that part of the process, too, that would cut down on
12 the amount of time the Court would have to say the same thing
13 over and over again about this is how the voir dire process
14 is going to begin.

15 The people have -- there is some
16 formalities -- they probably need to be read the charge, some
17 kind of a statement of the case, the kinds of things that we
18 do in voir dire in a routine case. Again, I can see that
19 being done on video.

20 And to the extent that you wanted to have
21 some personalized hands-on, that would be fine, but I think
22 we could probably replace most or all of it with a video that
23 was done for people. They see a video anyway, and it could
24 be a shorter, less flags and graphics kind of video than the
25 Supreme Court has given us -- although the soaring music, I

1 think, has to be part of it.

2 THE COURT: As I say, I am not conceptually
3 opposed to a questionnaire, and I do agree with the general
4 notion that if we have a questionnaire that it has to be
5 filled out here. I do not agree with those that might
6 propose sending out a mailing, that kind of thing. That
7 carries a lot of dangers, not least of which is you don't get
8 the return, and you get other people's input, and get things
9 that you don't particularly want in any trial, which is them
10 discussing the facts or researching the facts.

11 I think that, you know, you ask for
12 anyone who has heard something about the case and tell us
13 what it is, that sort of question, whether it's in person or
14 in a questionnaire, you don't want them doing the research to
15 find out, well, now I know the name of the case I am called
16 on, and look it up on the Internet and educate myself as to
17 what this case is about, and has a counter-productive result.

18 So, you know, I think if we do some kind
19 of video or up-front caution, I think it ought to be
20 emphasized in as many places as we need to emphasize it,
21 which would include the questionnaire itself. Now that you
22 know the name of the case, you are ordered not to do any
23 research about it apart from telling us what you already know
24 about the case. We definitely need that sort of thing.

25 As I say, my experience in this

1 questionnaire aspect of the case is that it's time-consuming
2 for the lawyers to go through them, make their lists of who
3 is objectionable, based on the responses who should be
4 challenged for cause. And then my experience is it takes
5 quite a bit of time -- in those areas where there is no
6 dispute, I think you can pare those down.

7 But a lot of times I have seen disputes
8 as far as what one side thinks is an appropriate challenge
9 for cause and what the other side thinks is an appropriate
10 challenge for cause, and then that takes up additional
11 judicial time. I am not certain that I will have the time to
12 chew on these as much as you folks may be able to, with what
13 my schedule is.

14 MR. BUTNER: Judge, if I might, just -- you
15 know, we were sitting here and we were talking about
16 stipulated strikes and so forth, and there is a couple of
17 Arizona cases, and you are probably more familiar with these
18 than I, but State versus Anderson. I mean, that is a problem
19 right there. I think with that particular case, at 197
20 Arizona 314, any kind of exclusion prior to voir dire is, I
21 think, error under that case. And both parties need to have
22 an opportunity to rehabilitate. And all that, of course,
23 requires oral examination.

24 And I am not saying that I wanted to
25 belabor this stuff, but I just think, you know, that there

1 are real limitations to a questionnaire, and we need to be
2 aware of those.

3 THE COURT: Do you want to address that,
4 Mr. Sears?

5 MR. SEARS: I do. I know the Anderson case.
6 We mentioned the Anderson in other context here. And I don't
7 read Anderson in any way as precluding the parties from
8 stipulating to challenges for cause subject to the Court's
9 approval. The Court can, as in all stipulations, can object
10 to the stipulation.

11 I think what Mr. Butner might be thinking
12 of is that part of the case that talks about it being error
13 for the Court to unilaterally strike people, without offering
14 either side the opportunity to individually voir dire the
15 people.

16 I had this come up in federal court,
17 where we were picking a jury for a very long trial in
18 Phoenix, and we were using jurors from what they call the
19 northern district, the northern tier of counties, and we were
20 proposing people coming from way up on the reservation or way
21 up on Golden Valley coming to Phoenix for a three-month
22 trial, and we would go through this process, and no one
23 seemed to have a problem with the place or length of the
24 trial. And Phoenix in the summertime.

25 THE COURT: And so many strikes against them.

1 MR. SEARS: Everybody came and said that would
2 be fine. And we discovered that the jury commissioner, in a
3 burst of good faith, was pre-screening people -- was calling
4 up people on the phone and giving them a heads up. And the
5 people that said Phoenix in the summertime? Are you kidding?
6 Those people didn't show up. And so we had this
7 cherry-picked group of people that showed up for trial. That
8 is the kind of issue that I think could be error, obviously.

9 But what we are suggesting is looking at
10 the questionnaires and making judgment calls between
11 ourselves. There may well be a large group, and I may be
12 misapprehending the degree to which I think Mr. Butner and
13 our side can get along in this case, but I don't think I am.
14 But if I am, all that means is the number of people we would
15 stipulate is a smaller number than I thought it was.

16 The numbers we are picking are not magic
17 numbers. If the Court looks at this and says, well, there's
18 a pile of 50 questionnaires here that you all could agree on,
19 and I can't look at those 50 questionnaires and quickly
20 decide that I am going to exclude many of them, any of them,
21 some of them, at that point. So those people show up on
22 May 4. That's the net effect there.

23 So it doesn't require -- at least in the
24 way we're thinking about this -- it doesn't require endless
25 amounts of the Court's time to resolve whatever it is that

1 Mr. Butner and our side cannot agree upon. But what we are
2 saying is the fallback if you don't do that is everybody
3 comes to court. And if we have a questionnaire, all that
4 questionnaire is is just a little bit of advance information
5 about the voir dire.

6 The voir dire takes longer. People sit
7 around longer in larger groups, which is a dangerous concept.
8 They sit around. And we eventually get to the same place,
9 where we are going to be making challenges for cause.

10 I have this recollection, and
11 Mr. Guastaferro has a very similar story of a judge in a
12 similar situation having a questionnaire, and after the juror
13 is excused, holding up the questionnaire and saying "Why did
14 this person come in? Why are we talking to this person? Why
15 couldn't we have found a way to exclude that person?"

16 I just know, from recent experience, that
17 we are going to get a lot of those in this case -- more than
18 you would think. And seeing those people up front is not
19 going to be a problem.

20 THE COURT: Well, the alternative to doing the
21 questionnaire is to -- in order to get the kind of numbers
22 that we are talking about, is to bring in several groups of
23 very large groups and --

24 MR. BUTNER: Exactly.

25 THE COURT: -- and probably -- unless Judge

1 Brutinel were to spring for my renting the Ruth Street
2 Theater or something like that, would be functionally
3 prohibitive. We don't have a courtroom in the place that
4 will handle large numbers.

5 MR. SEARS: Do we know how many people we can
6 get in the Division Two courtroom if we had to do that?

7 THE COURT: I don't know.

8 MR. BUTNER: Judge, that is basically what I
9 have been through, is to bring in large groups and have them
10 basically screened orally by the Court and counsel of the
11 voir dire process. It's worked very well and rather
12 expeditiously. I have done it in two cases without
13 significant problems.

14 THE COURT: Bocharski and what else?

15 MR. BUTNER: And Scott Bryan.

16 THE COURT: I remember that one as well.

17 MR. BUTNER: And we had significant pretrial
18 publicity in Bocharski, too, at two different times.

19 THE COURT: The deal with that is the long
20 time from when it had occurred to when you were doing the
21 selection. That didn't have the same nature of the
22 continuity of publicity that you get in cases such as this
23 one.

24 MR. BUTNER: And I'm not saying that they had
25 as much publicity as this particular case.

1 THE COURT: The selection for Bocharski was
2 also a much shorter prospective time frame for how long the
3 deal was going to take.

4 MR. BUTNER: Right. Like six weeks, I
5 believe.

6 THE COURT: I don't remember Bryan's case to
7 the extent of how long that trial was.

8 MR. BUTNER: We were in a rush in that case.
9 I am not kidding either when I say that. Not my rush, but
10 the defendant's rush.

11 MR. SEARS: I did the appeal in Scott Bryan's
12 case. I remember when Jack Williams was sick and we did the
13 appeal.

14 MR. BUTNER: But my point, being -- from the
15 State's point of view, I don't think that we are going to be
16 stipulating that certain people are not going to -- are going
17 to be stricken for cause before they ever answer a question
18 orally. I don't see that happening. They may answer very
19 few questions orally, certainly. I understand that.

20 THE COURT: I think that a questionnaire that
21 pertains at least to the publicity and at least to the
22 hardship timing length of trial kind of issue, however, would
23 be valuable. And whether there's agreement between both
24 sides or not with regard to who gets excused because they are
25 unavailable for family needs or financial hardship, I think I

1 am still going to have to make some rulings with regard to
2 that. That is how it happens in a normal seating of
3 prospective jurors. I ask -- and that usually is a time
4 cumbersome sort of process for the -- okay, who in the back
5 row or the middle row or the front row has issues with regard
6 to the timing of the two-week trial or the three-week trial.
7 But you are talking about a trial that is longer than that.

8 MR. SEARS: Judge, I think that Mr. Butner
9 would be surprised to see the responses that would be
10 provided in a carefully written and thoughtful questionnaire
11 that went to the death penalty issues.

12 The jurisprudence in the Supreme Court --
13 Morgan, Witherspoon, all of those cases -- have really
14 crystallized. It's one of the rare areas where, at least at
15 the present, there is very little disagreement about what the
16 state of the law is with respect to those people. And what I
17 have found, doing capital cases around the country, is that
18 people have pretty clear attitudes.

19 There was a time when people would be
20 surprised by the death penalty and they'd say "Well, I never
21 really thought about it." I think those days are behind us.
22 And I think what you see is people have pretty definite
23 ideas, and the majority of people will answer thoughtfully
24 and will need to be questioned directly about their
25 attitudes. They will fall in the middle range between the

1 two positions.

2 But there will be -- I would promise the
3 Court and Mr. Butner -- there will be a significant number of
4 questionnaires that will produce responses to questions that
5 the State has a chance to have input on and the Court will
6 ultimately approve, that will clearly and unequivocally put
7 them in an excludable category that reasonable people like
8 Mr. Butner and me and the lawyers on my team would agree
9 makes them impregnable to rehabilitation in either direction.
10 They would be so extreme in their position that it would be
11 pointless and a waste of everyone's time and their time to
12 bring them in and try to move them off the position that
13 they've expressed.

14 And I think Mr. Butner thinks what he
15 thinks now. He reads the questionnaires, I think his mind
16 may be changed on that.

17 I think that maybe when you see what
18 people say today in 2009 and 2010 about the death penalty, it
19 is pretty clear cut. People have opinions. They will -- and
20 if you look at it the other way, you have people that
21 become -- this is where the rehabilitation process sometimes
22 goes, and to me this is utterly unsatisfactory and not what
23 the Supreme Court had in mind -- where the lawyers will go
24 back and forth trying to push somebody to a different point
25 of view. They've expressed their point of view, and now you

1 are going to try to pull them in one direction or another.

2 And sometimes they are too easily pulled.
3 They will say "I absolutely vote for the death penalty every
4 time."

5 And if you say, "Really? Every time?"

6 "Well, no, maybe not every time." Then
7 what do you do?

8 They've said over here they would vote
9 for the death penalty every time but now they're saying maybe
10 not so much. And they go back and forth and back and forth.
11 And ultimately, the judge leans in and says something like,
12 "Well, the law requires that you keep an open mind and be
13 fair and impartial. Will you do that?"

14 The person looks at the judge and says
15 "Yes." But you still have their question and answers for the
16 20 minutes preceding that where they are all over the
17 ballpark, where they're going back and forth.

18 Or where people come in and dig their
19 heels even deeper in, and you've wasted 20 or 30 minutes
20 trying to get that person to say, by asking them 50 different
21 questions, something different than what they said.

22 But if they had said it that clearly in
23 the questionnaire, we could take them at their word,
24 particularly if they are instructed about how serious the
25 questionnaire is, and they were told that the answers to the

1 questionnaire -- I've suggested in the past that the
2 questionnaire be -- there would be some language in there
3 subject to penalties for false statements or perjury, to
4 really emphasize to people how serious this is and how
5 important it is for their answers to be complete and honest.
6 But it just happens. You see this.

7 I saved some of the questionnaires from
8 some of my cases. I have them in my office. And people say
9 some pretty strong things in these questionnaires, because we
10 are not asking them about their favorite T.V. programs or
11 something. We are asking them about these questions.

12 THE COURT: I haven't seen a questionnaire
13 that doesn't have language in it that pertains to the answers
14 are under oath, subject to penalty of perjury. I haven't
15 seen a question that doesn't have that in it. You apparently
16 have.

17 MR. SEARS: In federal court. But I would
18 agree, I think that's important.

19 THE COURT: Well, conceptually, as I say, I am
20 willing to take a look at what you are proposing, in
21 particular with regard to those three major issues.

22 I think you ought to share with
23 Mr. Butner what your proposal is, and I will hear from him
24 after he has taken a look at it, if you can work on paring it
25 down between now and next week.

1 MR. SEARS: Mr. Guastaferrero had a comment.

2 MR. GUASTAFERRO: Thank you, Your Honor.

3 Two points. Even when the juror is
4 otherwise cleared by the Court and the parties, the research
5 shows that they don't understand the sentencing scheme. They
6 are very confused about mitigation. The idea that the
7 prosecutor's proof has to be proof beyond a reasonable doubt
8 about aggravators and that the defense of proof about
9 mitigators is a preponderance of the evidence, it is
10 confounding to jurors.

11 And I think that without a questionnaire,
12 to get an initial read on what the juror's understanding of
13 that -- there are still people in this country -- all over
14 the country -- who believe that the death penalty is
15 automatic for certain crimes, and they haven't really plugged
16 into this aggravator-mitigator scheme that the Court
17 certainly wants us to follow in all of these very important
18 cases.

19 So it is the questionnaire plus the
20 questioning that gets us to really understand the jurors'
21 attitude. And this will be my last comment, I promise -- but
22 at the risk of being the total out-of-town heretic, there is
23 no credible behavioral science research that links veracity
24 with demeanor. It is just not hooked up. Especially in a
25 courtroom situation where the atmosphere is very strange to

1 people, where a man in a black gown sits elevated in the air
2 and speaks down to people who are lay people who are not
3 familiar with this setting. Their demeanor is going to be
4 off, and they are going to be concerned, and they are going
5 to be nervous. And if we read into that demeanor without
6 very, very probative questioning, we will be making some snap
7 judgments about people that are totally unfair.

8 THE COURT: Timing of this? If we are
9 starting on May 4th with the trial date, what is your
10 proposal for timing of having the final questionnaire ready,
11 having the copies ready, having people come and fill it out,
12 if we do that?

13 MR. SEARS: Well, I had some specific ideas,
14 and one of them just occurred to me, which was in order to
15 minimize the -- and this may have something to do with
16 whether we make decisions in advance about where we were
17 going to be picking jurors from -- but assuming that we are
18 going to be picking jurors either in part from the Verde or
19 entirely in the Verde, maybe it would make sense to consider
20 having the Verde district jurors go to the Verde courthouse,
21 the copper palace -- somebody in the newspaper called it --
22 and filling out their questionnaires with the same video. I
23 haven't seen it, but I imagine there is at least as nice,
24 probably a nicer jury assembly room.

25 THE COURT: Nicer.

1 MR. SEARS: Not surprising. Over there for
2 them to do that.

3 We were looking at having them start
4 Monday, April 5th in the morning, and go through to the
5 morning of Friday, April the 9th, in groups of 50. And if we
6 had a morning and afternoon session each of those days, that
7 would be a maximum of 450 people summoned. And based on what
8 the jury commissioner has told me about return rates, we
9 should get somewhere in the neighborhood of 225 people
10 actually showing up to fill in the questionnaires.

11 Because we have toyed with a couple of
12 ideas, and one of them is sending out a less formal notice to
13 a pool of jurors to sort of ping them to see if they are home
14 and they're there, but we couldn't think of a way to do that
15 that wouldn't either cause them to start the process of
16 figuring how they were going to get out of this, in the first
17 place, earlier. So we thought a summons with the report date
18 and all the trappings that go with it makes the most sense.

19 And then one thing that we have done
20 before, rather than having the copiers burning up on Friday
21 afternoon would be if you cut the -- you could take the
22 morning session people and start copying their responses in
23 the afternoon while the people are doing that and trying --

24 THE COURT: There is that second person
25 pronoun, again.

1 MR. SEARS: We would be happy to go over and
2 help.

3 THE COURT: As I say, that is one of the
4 logistical issues that I may have, just based on what my
5 trial calendar is currently and --

6 MR. SEARS: Well, this is a week that doesn't
7 involve you.

8 THE COURT: Yeah.

9 MR. SEARS: This is a week of people coming
10 in.

11 THE COURT: Involve me, but may involve my
12 staff or the clerk's staff or somebody to physically make the
13 copies and not break all the machines.

14 MR. SEARS: Come five months out with this
15 proposal, and say we are targeting this week of intensive
16 work, you know, if we need to get additional staff -- copying
17 is copying. I mean, if we are running short-handed, we've
18 got people -- not me. I am not allowed near the copier, but
19 people that know how to work the copier could help out to do
20 that.

21 And then what we had in mind was picking
22 a date in the middle of next week. I just arbitrarily picked
23 the following Wednesday, which was April 14, as a time when
24 both sides could meet again without the Court present to see
25 what we could do. That is not a magic date. That could be

1 plus or minus. I don't think it should be much sooner than
2 that, because we would want time to be with these
3 questionnaires and create our own database and do some
4 screening there and start compiling our list.

5 But the idea would be that we would meet
6 with lists. And they may be short lists and they may be, as
7 I hope and expect, longer lists of hardship and publicity and
8 death penalty extremist strikes -- I am trying to think of a
9 better way to describe that -- but the obvious Morgan strikes
10 there. And then have some time whenever the Court did,
11 probably the following week, which would be -- if the Court
12 had any time, an hour or so to look at these.

13 And what we could do is, rather than just
14 show up and give it to you, what we might be able to do is to
15 give you some sort of a summary saying here are two lists.
16 Here is a list of the jurors by name and number that both
17 sides agree to be excused for cause. You have their
18 questionnaires. You have a set of their questionnaires.
19 Here is the State's list. Here is the defense list of jurors
20 that we think could be excused under similar criteria but on
21 whom we cannot agree, and have the hearing saying, okay, we
22 are just going to look at those lists and see what we are
23 going to do.

24 And it may be that you look at them and
25 say "I am no clearer than you all are. If you can't agree, I

1 can't agree." Or you may have something to say. I guarantee
2 you those people would never survive judge voir dire in this
3 case because of this answer or that answer.

4 And then the net balance, whatever that
5 number is, are told to report on which of the days the week
6 of May 4 we randomly assign them to. We have different
7 panels. That would be a panel -- they would be given a
8 number, and they would be given a call number. And they can
9 just say call -- you are supposed to report -- Panel No. 4 is
10 supposed to report on May 7. Call on May 6 to see if you
11 still have to come.

12 THE COURT: Well, I won't enter any final
13 orders at this point and let Mr. Butner be able to chew on
14 what you provide to him, see what he would add to it or
15 subtract from it. I am willing to begin the process of doing
16 some sort of questionnaire, in particular with regard to
17 those issues that I identified that I think are the -- you
18 know, I don't regard a questionnaire as a time to start
19 sandpapering people, but I do think it can be very helpful in
20 terms of getting the information necessary to ultimately
21 exercise strikes and get an appropriate-sized jury for the
22 case.

23 So, please, if you would go forward,
24 then, with a draft of what you are proposing, circulate it to
25 Mr. Butner, and then we can start addressing that perhaps

1 next week.

2 MR. SEARS: That would be just fine with us,
3 Judge.

4 The couple of things that occurred to me
5 just in terms of other issues, whether this is the time or
6 whether it is too early to be thinking about where the jury
7 should be, where we are going to send the summons, whether
8 it's a county-wide jury, a Prescott only --

9 THE COURT: I didn't have Mr. Butner address
10 that issue. And typically we draw the jury at random from
11 all across the county. The fact is that the publicity --
12 leave aside the hardship, but the publicity has primarily
13 been in the Tri Cities or Quad Cities, whatever we are
14 calling ourselves now on this side of the county.

15 And my experience with a high-profile,
16 much-publicized case back 12 or 15 years ago was trying the
17 case twice on the front pages of the Courier. If we sent out
18 a questionnaire a third time, we were going to have no
19 trouble getting a jury from the county that, at least based
20 on their responses to the questionnaire, apparently didn't
21 listen to the radio, didn't read the Courier -- no offense to
22 the Courier -- but didn't -- and of course, we have more
23 online now and more people that use the Internet for news
24 online.

25 But we weren't going to have any trouble

1 if the case had gone to trial a third time, in getting a jury
2 that at least proclaimed that they could be fair and
3 impartial and hadn't read anything or heard anything about a
4 case that had been on the front pages and on the major couple
5 of radio stations in town for weeks.

6 MR. SEARS: Is this the murder of the Circle K
7 clerk?

8 THE COURT: No. This was the murder of the
9 husband in Williamson Valley.

10 MR. SEARS: Okay. I was trying to think of
11 the last case that was moved where a venue motion was
12 granted.

13 THE COURT: I think what you are thinking of
14 was the last case that was moved --

15 MR. SEARS: Chet was involved.

16 THE COURT: -- Judge Anderson moved the
17 Circle K killing to Flagstaff and then to Phoenix.

18 MR. SEARS: That has been many years. I could
19 not remember a case --

20 THE COURT: Castaneda.

21 MR. SEARS: I couldn't remember a case since
22 then that was moved on a change of venue.

23 THE COURT: I can't remember one either that
24 has been moved, but I am getting old. Aren't we all? But --

25 MR. SEARS: Possibly.

1 THE COURT: Maybe you guys are getting
2 younger.

3 But I can't remember one since Castaneda
4 because of pretrial publicity that has been moved. And that
5 Darrow case has kind of been my own reaction to, essentially,
6 you are going to have to show me that the jury pool is
7 totally tainted, because we can get people from Bagdad,
8 Congress, Seligman and the Verde Valley that probably don't
9 know peep about this case.

10 MR. BUTNER: That is exactly my experience,
11 Judge. I had a case where the pastor of the Verde Valley
12 Baptist Church and three of his children were killed.

13 THE COURT: I had something to do with part of
14 that.

15 MR. BUTNER: Right. And even in that case,
16 yeah, there were a number of people from the Verde that
17 indicated that they had heard something about it. It was all
18 over the news.

19 THE COURT: I had the civil case for a time
20 that connected up to that case.

21 MR. BUTNER: But in terms of county-wide
22 jurors, we would have had no trouble, ultimately, guilty on
23 the first day of trial.

24 THE COURT: You may well get a large number of
25 people, particularly because of who the parties are, at least

1 the defendant, that are not lacking in their own prominence
2 in their own community for various reasons. You may have
3 trouble with people from Prescott that say they are
4 unfamiliar with the publicity, but I don't know that outside
5 of the Tri Cities area it's going to be a problem. And maybe
6 that is where the strikes come in.

7 I guess I would suggest that you draw
8 from the whole county, but let's see what happens.

9 MR. SEARS: I think that would be our
10 preference to start. I have very much the same collective
11 experience that Mr. Butner and you do have about that.

12 In our mind, that is another reason to
13 look at a questionnaire with questions about those jury
14 things, so that we were not surprised after going to the
15 trouble and expense of pulling in a panel of several hundred
16 people that the degree to which people do know about the case
17 is more than the expected. You just can never know. There's
18 6-percent of the population, apparently, that claim they
19 don't know who Sarah Palin is.

20 THE COURT: How many?

21 MR. SEARS: It's only 6-percent, now. The
22 number has dropped.

23 I think the point of that is that I think
24 all of the Court's assumptions about this are probably going
25 to pan out and be correct, but it would be, I think, better

1 and more efficient and less burdensome and less costly to
2 know sooner rather than later if you are right.

3 THE COURT: And I suppose depending on how the
4 questionnaires come back at that point, you may want to think
5 about moving it. But I have my doubts that the responses
6 that you are going to get are going to show -- and maybe it's
7 an unfortunate commentary on society and their attention to
8 current events in the community, the county, or the nation,
9 but I have my doubts that there is going to be a problem
10 getting a jury in Yavapai County that hasn't heard about the
11 case.

12 MR. SEARS: Again, I think this also points
13 up -- not because it is our wisdom, but just the general
14 wisdom of having jurors come in smaller rather than larger
15 groups is that -- I think we have had a lot of experience
16 where somebody during general voir dire just in an ordinary
17 trial will say "Oh, is this the case about so and so," and
18 everybody is dying for that juror to stop talking, and before
19 you know it, that is the end of the panel.

20 THE COURT: I don't want that additional delay
21 or cost.

22 MR. SEARS: No. And getting information from
23 them about pretrial publicity and about those kind of things
24 is a good way to do it, and then not having them come in
25 groups of hundreds to the courthouse minimizes that, and also

1 minimizes the degree to which they interact with each other,
2 trying to guess which case this is, as they sometimes do.

3 THE COURT: Well, as I say, I would prefer if
4 we go the questionnaire route, which I am leaning towards,
5 that there be an order on there by the Court in filling out
6 of things that now that you know what case you are being
7 quizzed about, that you absolutely, positively do no research
8 to learn more about what the case is about.

9 MR. SEARS: There is one other piece of this
10 that maybe Margaret or Diana from the jury commissioner's
11 office can help us with next week, which is the numbering and
12 listing of this, that I am familiar, the Court is familiar,
13 we are all familiar with the way in which they produce lists
14 that have the name of the juror, and then a multi-digit
15 number with a bar code assigned to them.

16 And if we are going to get a
17 couple-hundred-plus questionnaires, it would be nice for us
18 to have a little input and understanding going in of what
19 numbering system, how it's going to be done, so that when we
20 go to try and compile this data, particularly in a relatively
21 short period of time -- over three or four days -- that we
22 have some agreed-upon uniformity in advance that we can
23 expect. Say, we're going to get the questionnaires, it is
24 going to have your name and it's going to have your juror
25 number, and the last three digits are going to be the number

1 that we will all agree that we can identify the jurors by in
2 this case. And I am sure they can answer that question in 30
3 seconds, probably.

4 THE COURT: Probably would answer the question
5 for you if you go down there right now.

6 MR. SEARS: Right. But I think it would be
7 important for us to all know going in that that's how we're
8 going to do that.

9 THE COURT: I don't have any objection to
10 Margaret coming in and explaining to us on the record how
11 that --

12 MR. SEARS: She was hesitant to come in today
13 because she thought we might waste her time.

14 THE COURT: All right.

15 MR. SEARS: And I was not in a position to --

16 THE COURT: Assure her otherwise?

17 MR. SEARS: No.

18 MR. HAMMOND: Judge, one of those questions
19 that maybe you can answer for us -- will the group of people
20 to whom the questionnaires are sent be a fresh group of
21 jurors? That is, will they be people who haven't been called
22 sometime for some other jury service in the last few months?
23 I don't know how often you turn over your list. I mean, are
24 we going to have people who were on a list on January 1 and
25 may have already been called a couple of times and have been

1 dismissed?

2 THE COURT: I don't know when their quarter
3 changes.

4 MR. HAMMOND: Is it done on a quarterly basis
5 here?

6 THE COURT: Four months, not quarterly.

7 MR. HAMMOND: So if we did it the 1st of
8 April, we would be starting out -- forgive my ignorance,
9 here, but we would be starting out with a relatively new
10 group that hadn't previously been called for jury service, at
11 least within the last --

12 MR. SEARS: Or maybe the very end of the group
13 that was called in January.

14 THE COURT: Yeah. See, I have uncertainty
15 with regard to that, when their third of the year changes.

16 MR. HAMMOND: We should find that out, because
17 I think in terms of how many jurors we will go through, we
18 will do much better, I think, with a group that hasn't been
19 in the process for the last four months.

20 THE COURT: And I don't know when they do
21 their changeover.

22 MR. SEARS: Is it possible to think about
23 calling --

24 THE COURT: You can ask.

25 MR. SEARS: -- a special panel? Is it

1 possible to consider calling a special panel just for this
2 trial that's not part of the regular rotation?

3 THE COURT: I don't know.

4 MR. SEARS: We will take a look at that.

5 MR. BUTNER: I don't think that is a good
6 idea. I understand Mr. Hammond's concern, and I am not
7 saying that it isn't a valid concern, but by the same token,
8 I don't think it's a good idea to call a, quote, "special
9 panel" either. I think we run a risk of all kind of things.

10 THE COURT: Well, I don't know what "special
11 panel" means.

12 MR. BUTNER: I don't either, but it doesn't
13 sound like a good thing to do.

14 MR. SEARS: Maybe not special. Maybe a
15 singular panel for this case, with the idea that if we were
16 towards the end of their 120-day service, and we said you are
17 going to come in and do a multi-month trial here, that would
18 effectively extend your -- they would now be looking at a
19 six-month tour of duty. Whereas if we said why don't we look
20 at -- if you were otherwise going to pick a new panel May
21 1st, maybe we could take people from that group in
22 anticipation, and you can fill in some other way, so that
23 people who were otherwise going to be called, they were
24 coming up to be called, but we call them so that we are not
25 getting people at the very end of their term.

1 THE COURT: Well, I guess I don't understand
2 the reluctance to have people who are coming up at the end of
3 their term. If they have served on a jury, they are not
4 going to get recalled in the same third of the year that they
5 were already called for another panel, as I understand how
6 the process works.

7 MR. HAMMOND: If they were called and
8 dismissed?

9 THE COURT: If they are called and seated and
10 dismissed, they won't get called -- certainly if they were
11 seated they won't get called back.

12 MR. HAMMOND: But if they were called and
13 released for hardship or called and released because there
14 were more jurors than the Court needed?

15 THE COURT: Then potentially they could get
16 called back for another jury, and I think that is true of the
17 jury that Judge Hess is doing right now.

18 MR. SEARS: Maybe it is just my failing
19 memory, but I thought over time I had been in jury selection
20 in other kinds of cases in which people had said they had
21 just been on a jury the previous week. And in fact, I can
22 remember one that had been on one the previous week with that
23 Deputy County Attorney, and they were back again.

24 THE COURT: How far back are you going?

25 MR. SEARS: Maybe further than I can remember,

1 maybe. Maybe more than a few years.

2 But you don't think that is true. If
3 they serve, they get one trial per session?

4 THE COURT: Per season. I think so. That is
5 my understanding.

6 That is why it's important to get someone
7 from the jury commissioner's office, to understand when the
8 changeover would be.

9 MR. SEARS: I can try and run some of that
10 down before we come back next Wednesday.

11 THE COURT: And maybe it would speed up the
12 answers of whoever shows up from the jury commissioner's
13 office.

14 But I wouldn't mind having them in here
15 to help us -- you know, five minutes, take them away from
16 whatever they are doing, and not impose on their time too
17 much, but some of these things need answers, I think, for us
18 all to understand what the process might be.

19 MR. HAMMOND: Judge, I think you also asked
20 about next week's schedule. I think you were talking about
21 Thursday or Friday.

22 THE COURT: Thursday or Friday.

23 MR. HAMMOND: I would like us, if we could, to
24 do it on Thursday.

25 THE COURT: That is available to me, but I

1 don't know what is available for John or Joe.

2 MR. BUTNER: I don't know what is available
3 for Joe.

4 THE COURT: Do you want to take a break and
5 make some calls?

6 MR. BUTNER: I would have to do that.

7 THE COURT: Be happy to take a break.

8 Stand in recess --

9 MR. SEARS: Next Thursday afternoon or any
10 time Thursday?

11 THE COURT: I think I have anytime on Thursday
12 the 17th. I think I have anytime currently on Friday the
13 18th, also.

14 MR. HAMMOND: Judge, my problem on the 18th,
15 so I could prevail on Mr. Butner, I am doing the commencement
16 address at the other State law school on Friday, and I really
17 I would love to get out of it, but I don't think that I can.

18 THE COURT: I harbor no ill will toward the
19 other law school.

20 (Brief recess.)

21 THE COURT: Record can reflect that we are
22 resuming in a little more than ten minutes, but all of the
23 parties I mentioned before are still here.

24 Mr. Sears.

25 MR. SEARS: I have a 1:30 juvenile matter next

1 Thursday. I would certainly be available in the morning. In
2 the morning still works for everybody else. That is where I
3 am. Or after two o'clock.

4 THE COURT: Mr. Butner.

5 MR. BUTNER: The afternoon is better for me,
6 Judge, if at all possible.

7 THE COURT: How long is your juvenile matter,
8 Mr. Sears? And how much time are we going to need for
9 whatever we doing next week?

10 Part of the reason why we moved this to
11 the 9th is we were afraid we didn't have enough time on the
12 15th.

13 MR. SEARS: Right. Well, what I thought -- my
14 juvenile matter probably won't be lengthy. There is some
15 pressure on the juvenile to admit. If there is, we have to
16 go through that process. You know how it goes. There is no
17 plea agreement. It's pretty straightforward. I am not sure
18 if that is going to happen or not.

19 THE COURT: Judge Brutinel doing that himself?

20 MR. SEARS: He is. And she is not detained,
21 so if it didn't get done that day, I don't know that anybody
22 you would terribly upset. But I would be available, too.

23 THE COURT: What do you want to have heard
24 next? We had it scheduled for a little pretrial when we
25 hadn't had everything so recent.

1 MR. SEARS: What I would like to do, Judge, my
2 optimum scenario would be to -- people seem to be fading
3 here, but if we could -- we would have the questionnaire
4 circulated, and I thought the first order of business would
5 be to look at the draft questionnaire we have and see
6 if -- where we are on that.

7 And I would -- hopefully, I would be able to
8 talk to the jury commissioner and have some answers about
9 some of these technical questions we raised a couple of
10 minutes ago about picking jurors from different parts of the
11 county and the sequencing of that stuff related to some of
12 these dates that we're proposing.

13 THE COURT: Do you think if we start at 2:30
14 we could get through whatever you all want to have before
15 4:00?

16 MR. SEARS: I am sure we could.

17 THE COURT: Mr. Hammond would be available on
18 Thursday but not Friday. Mr. Butner would be better
19 available in the afternoon on Thursday. That would seem to
20 work with me.

21 Mr. Hammond, on defendant's behalf, filed
22 a motion that I referred to earlier, pursuant to the e-mail
23 that he previously sent last week. Is that something that we
24 ought to take up on Thursday, next week, as well as the jury
25 questionnaire?

1 MR. HAMMOND: We could. I spoke to Mr. Butner
2 about this during the break, and if we need to take more time
3 on it, I think we can.

4 Mr. Butner did provide us, just a moment
5 ago, with a part of what we had asked for. He has now given
6 us the materials upon which Mr. Echols relied, a list of
7 those. So that issue is eliminated.

8 But we may need -- and I actually will
9 defer to Mr. Butner on this -- but if we don't have agreement
10 as to what the State's arguments are to provide the
11 identification of documents and witnesses in support of each
12 aggravator, if the State doesn't believe it's required to do
13 that, then I think we probably do need to have at least a
14 conversation about it, if not an argument. But I have said I
15 believe that the rule is clear on what the State has to do,
16 and now that we know which aggravators have survived at least
17 the Chronis part of the case, we think it would be important
18 for us to have an identification of the precise witnesses and
19 documents.

20 THE COURT: Mr. Butner, if we have
21 two-and-a-half hours to work with, can we do both issues that
22 pertain to that?

23 MR. BUTNER: I think we would be able to,
24 Judge. Sure.

25 THE COURT: Then let me plan on 2:30.

1 Hopefully, that will give you enough time to get a plea done,
2 if it goes that way, or to move it off to a different day, if
3 Judge Brutinel will let you do that. If you would let him
4 know, I will see if I can e-mail him and let him know I would
5 appreciate him getting you out of there as soon as he can so
6 can I start this up at 2:30.

7 I would like, then, to vacate the 15th,
8 so that there is not a needless half hour of stuff in there.

9 MR. SEARS: That's fine. Thank you.

10 THE COURT: Acceptable to the State, also, I
11 presume?

12 MR. BUTNER: It is, Judge.

13 THE COURT: I will vacate the 15th, and we
14 will handle what we need to in terms of jury selection issues
15 and pretrial conference. You can update me on how things are
16 going with regard to discovery issues and talk about --
17 discuss, if not argue the motion that Mr. Hammond presented.

18 MR. HAMMOND: Judge, I think Mr. Butner may
19 want to ask an additional question about your DNA-related
20 ruling, but before we do that, while we are talking about
21 scheduling, Ann Chapman asked me to raise with the Court our
22 belief that we may need another day for a hearing that is not
23 now scheduled.

24 We are going to be filing -- of course
25 now that we have a Chronis ruling -- we will be filing what

1 we have been calling the "omnibus death penalty motion." And
2 we believe there will be a need for a hearing on that. We
3 don't, right now -- and I believe Ann is right about this --
4 we have evidentiary hearings scheduled on motions in limine
5 for the 12th through the 15th.

6 THE COURT: Let me -- if I might interrupt you
7 just for a second -- let you know that I had to take the
8 afternoon of the 15th on a significant sex case that I have.
9 So you don't have the afternoon of the 15th.

10 MR. HAMMOND: So we really have, then,
11 two-and-a-half days for the in limine hearings?

12 THE COURT: You have three-and-a-half.
13 Tuesday, Wednesday, Thursday, and half of Friday.

14 MR. HAMMOND: And Friday morning. I think,
15 given the time that will be required for us to finalize the
16 omnibus motion and for the State to respond and us to reply,
17 we ought to be looking for a date to deal with that omnibus
18 motion. I would guess sometime in mid-to-late February.

19 THE COURT: I need about seven lawyers to
20 settle their cases, then.

21 MR. HAMMOND: Give me the list and we'll
22 take care of it.

23 THE COURT: I would be happy to give you a
24 list and have you take care of it.

25 MR. HAMMOND: And if you would like us to, we

1 could give you something in writing requesting this, and we
2 could talk about it next week.

3 THE COURT: You don't think that the motions
4 that you have can fit into the time frame that we have where
5 the week is set aside already?

6 MR. HAMMOND: I don't think so. This motion
7 will have in it a fair amount of data that I think the State
8 is going to want to respond to. We have got a lot of field
9 work on the application of the death penalty in Yavapai
10 County and in Arizona, generally. It is data that I haven't
11 seen compiled in one place with respect to charging decisions
12 in homicide cases.

13 So I think that, and a few other issues
14 that are related to the overall constitutional question, are
15 going to take some time -- well, for us to finish, for one,
16 and for the State to respond to. And I just don't think we
17 will be through with that process by the 12th or the 15th. I
18 think we are going to need a day later.

19 THE COURT: All right.

20 Anything else that you think we need to
21 take up next week, Mr. Sears?

22 MR. SEARS: No. I had a little punchlist of
23 matters that I think are -- if we had a couple of minutes
24 now, maybe we could at least get an idea of where we are.
25 And what Mr. Hammond just raised was actually Item No. 1 on

1 my list.

2 Can you tell us whether you have started
3 scheduling matters into the Summer of 2010, with the idea
4 that you know when this case is going to end, or are you not
5 there yet?

6 THE COURT: I have not scheduled anything on
7 top of this case in June or July.

8 MR. SEARS: Okay. Do you have anything after
9 that, like in August?

10 THE COURT: No.

11 MR. SEARS: You are not there yet?

12 THE COURT: Not yet.

13 MR. SEARS: The reason -- a couple of things.
14 The State has culled their witness list considerably, but by
15 our count, they are still at a 131. And apart from the
16 issues of getting the interviews done and not really knowing
17 for sure whether those 131 is a firm list or whether there is
18 going to be further refinements, my recollection is
19 Mr. Butner said there may be further refinements, and I would
20 expect so.

21 But just trying to do the number of days
22 of trial with a witness list that large, I'm concerned that
23 if we are boxed in between cases before the trial and cases
24 after the trial, we are going to be in a time pressure
25 problem if the case takes longer to try for some reason or

1 another than I thought. I just wanted to sort of -- knowing
2 now that we haven't put the fence up at the backside, if
3 there was a way to give us a little flex at the end.

4 THE COURT: I think the number that you all
5 gave me early on was 30 trial days, and I don't recall when
6 the 30 ends. It seems to me it ends in July sometime.

7 I have a commitment, probably the second
8 week of August. That is the only thing on the tail end.

9 MR. SEARS: If we could just be mindful of the
10 possibility that it might go longer than advertised, for
11 reasons that have to do with the size of our defense case,
12 which is bigger now than it was in May when we were talking
13 about this, and the length of the State's case, which
14 although smaller in number, may be longer in time to present
15 now.

16 THE COURT: The lash only applies to lawyers,
17 not to defendants, with regard to getting the case done on
18 time.

19 MR. SEARS: I try to keep myself a sufficient
20 lash distance away from the Court, and I can move quickly.

21 Mr. Butner and I have had some
22 discussions about this handwriting business, and I invite
23 Mr. Butner to let me know -- the last information that I have
24 from Mr. Butner was that maybe it was just a couple of
25 documents, and I repeated what we had said before, which is

1 if we could see those documents or be pointed to them, we
2 could probably -- we would likely stipulate to Mr. DeMocker's
3 handwriting if we see it on those documents and cut the need
4 for Mr. Hale to do his work. I don't know how that stands
5 up.

6 THE COURT: Do you want to address that,
7 Mr. Butner? Can you address that?

8 MR. BUTNER: Judge, I was just looking at that
9 stuff.

10 In regard to Mr. DeMocker's handwriting,
11 we believe his handwriting appears on the retiring financial
12 advisory agreement. And then there is a document, for lack
13 of a better way to describe it, called a "Barb and Carol
14 score sheet."

15 THE COURT: You have Bates numbers, I presume?

16 MR. BUTNER: I don't have those.

17 THE COURT: Not with you, but you can give
18 those to Mr. Sears?

19 MR. BUTNER: Sure. And I think Mr. Sears was
20 aware of what documents --

21 MR. SEARS: I had forgotten the second part --
22 if we can take a look at those, obviously, whatever we say
23 about handwriting is just for that purpose and not any
24 agreement that those documents are relevant or admissible.

25 THE COURT: I understand that.

1 If you can look at that before next week
2 and if there is a stipulation you want to enter on the
3 record --

4 MR. SEARS: If you want to send me an e-mail
5 with Bates numbers.

6 MR. BUTNER: Okay. And then the other thing
7 was, you know, there is a lot of what we believe to be the
8 victim's handwriting on things. And I wouldn't expect any
9 kind of stipulation on that. I think that that should be the
10 subject of Mr. Hale's testimony and other people's, too,
11 probably, that says "Oh, yeah. I recognize her handwriting
12 on that."

13 So I'd ask for a stipulation that way. I
14 think we need Mr. Hale for that. And that would be notes on
15 the e-mails and the diary and all kinds of documents like
16 that.

17 THE COURT: But you are not looking for a
18 sample of the defendant's handwriting so that he can be
19 excluded from --

20 MR. BUTNER: You know, I don't think so at
21 this point, Judge, but I don't know for sure about that.
22 That is the problem with that.

23 MR. SEARS: Again, I repeat my offer. If they
24 have something in Carol Kennedy's diary that they think
25 Mr. DeMocker wrote, let us know and if he did, we'll tell

1 you.

2 MR. BUTNER: Well, of course, that is pointing
3 out a rather extreme example. I don't think that's what I am
4 talking about, Mr. Sears, and I don't think that is what you
5 think I am talking about either.

6 MR. SEARS: I just heard you say that.

7 MR. BUTNER: No, you didn't.

8 THE COURT: In terms of the diary?

9 MR. BUTNER: Yeah.

10 THE COURT: Let's move on.

11 MR. BUTNER: Yeah. Thanks.

12 MR. SEARS: That's fine. And if we can leave
13 it at that, that's fine.

14 Going back to the discussion we had
15 recently with you, Your Honor, about this -- if you remember,
16 this additional testing of the victim's clothing that the
17 State was proposing. We had a discussion about that.

18 The minute entry from that proceeding
19 directs the State to disclose which items it has asked that
20 be tested or retested, and to my recollection, we don't have
21 that list from the State yet of what items they have. And we
22 don't have -- we have some of the information from the
23 outside lab. Information was provided to us about their cost
24 and things like that, which we are going to have to take a
25 look at how much they would charge to provide us information.

1 But we really haven't, I don't think, resolved the sort of
2 fundamental question of that, which had to do with who was
3 going to do the testing and at whose expense and who was
4 going to be present -- back and forth -- except that I do
5 understand that D.P.S. will not agree to having anyone from
6 the defense present at their lab if they were to do the
7 testing. I think that is kind of where we sit, so I would
8 encourage or invite Mr. Butner to follow up on that.

9 THE COURT: Do you have any follow-up to date?

10 MR. BUTNER: I do, Judge, and that was
11 something that I was going to ask the Court about.

12 In regard to the one item that we were
13 talking about that gave rise to this issue, that being the
14 clothing on the victim, if I understood what the Court
15 basically was saying, that item probably should be sent to a
16 lab where the defense can have somebody be present.

17 THE COURT: That was my thinking.

18 MR. BUTNER: That is what I thought.

19 And that means it has to be sent to an
20 outside lab. I was trying to find out what might be the best
21 place for that to be done. And basically, our position is
22 that it would probably be a good idea to send it to the
23 Sorenson Lab, where these other things have been sent. The
24 defense can have somebody be present for that kind of
25 testing. It's going to cost money to do that. Everything

1 with the Sorenson Lab costs money, as we've discovered. So
2 that's where we are on that.

3 There are a bunch of other items that
4 still need to be tested, and I need to get Bates numbers
5 associated with them, like the Court said, in this order, and
6 that is why I am talking to you right now about these things,
7 to make sure I understand it properly. What we would like to
8 do, in regard to these items, is to send them to the D.P.S.
9 lab to have them -- in some cases, it would be sort of a
10 presumptive testing.

11 In other words, not really DNA, but to
12 see if there is anything there to be tested. And then at
13 that point in time, then we would encounter the next step,
14 which would be, well, what is going to be necessary to test
15 it. Is it going to be DNA testing, or is it just there is
16 nothing there, or is it just serology? I mean, I just don't
17 know the answer to that yet.

18 But there are a number of items. Like,
19 for example, the best example of that would be in recently
20 executed search warrants, several bunches of golf clubs were
21 seized out of storage units. We don't anticipate that there
22 is going to be DNA evidence or anything like that on those
23 things, but we do think that it would be appropriate to have
24 them tested to make sure, in essence, to exclude them. And
25 that can be handled at the D.P.S. lab. And then if there is

1 additional testing that needs to be done, then of course that
2 can be brought to the defense. And if it has to go to a
3 different lab or something like that, then we can cross that
4 bridge when we come to it.

5 Is that okay?

6 THE COURT: As far as I am concerned.

7 MR. HAMMOND: Judge, when we talked about this
8 when we were in the courtroom down on the first floor a
9 couple of weeks ago, we, I think, expressed our concern about
10 the timing of all of this and our concern that the timeline
11 may continue to draw out in ways that we think are
12 disadvantageous.

13 We have been talking all day about the
14 death penalty. Well, fundamental to us in this case are the
15 merits and the innocence part of this case. The DNA evidence
16 is, to us, critical to that part of the case.

17 And I think what the Court ordered and
18 what the minute order says -- or at least what we read it to
19 say -- is that the State would advise us promptly of any
20 additional DNA testing that they want to have done, so that
21 to the extent that we do have concerns about it, we can say
22 so. If we don't have a concern about it, we can say that,
23 too.

24 But I know we talked about -- there is a
25 piece of molding that was -- that went with the desk, that we

1 think was going to be sent off for testing, and we have not
2 heard further about that.

3 There are other items -- in addition to
4 the tank top, there were other items of clothing that were in
5 question. We have received a partial answer on some of that,
6 but I believe, at this point, particularly given the passage
7 of time and the shortness of time to trial, an appropriate
8 step would be what we thought had been done, which is that we
9 should be told immediately which items they wish to do
10 additional testing of so that we can at least confer with our
11 laboratory about what steps, if any, we believe need to be
12 taken.

13 We do not want to slow down this process
14 at all. We will move very quickly. We may preserve
15 objections to the timeliness of this, but we think at this
16 point we need to be at least aware of each item.

17 THE COURT: In the loop, so to speak.

18 MR. HAMMOND: We do need to be in the loop.
19 And I believe that's what the intendment of your minute order
20 was.

21 MR. SEARS: If I could just add one thing
22 about the time limit part of it. I went back and reread the
23 transcript of the proceedings we had on May 12th,
24 Mr. Butner's first day in court with us on this case, where
25 we were talking about the discovery cutoff. And what I read

1 was what I remembered of your order of your discussion about
2 additional scientific testing and the June 22nd cutoff.

3 And what you said, in essence, was that
4 things that were at the lab where testing was in progress, if
5 the testing couldn't be completed by the 22nd, that was one
6 thing. But to the extent that the State wanted to do
7 something with some piece of evidence that they had in their
8 possession on May 12th after the 22nd, it required good cause
9 shown and leave of Court. And what we are concerned about,
10 what Mr. Hammond is speaking to and what --

11 THE COURT: In terms of -- not in terms of
12 doing the testing, but in terms of being able to use it,
13 perhaps.

14 MR. SEARS: I mean, we recognize fully the
15 State can do anything it wants with regard to testing, but we
16 just wanted to alert the State and the Court to our belief
17 that -- for example, this piece of molding that has been
18 in -- the molding has been in their possession since July
19 2nd, 2008. And to our understanding, it has never been
20 tested. To this day, it's never been tested.

21 And while it is true that we don't want
22 to delay things, that is very concerning to us as it starts
23 to push this timeline back closer and closer to trial,
24 because we don't know what the outcome is. There has to be a
25 point, I think, at which -- particularly with regard to items

1 in their possession before June 22nd, there has to be a point
2 at which the testing has to stop, unless they can show
3 special good cause to the Court to go forth.

4 THE COURT: I disagree with you as far as
5 whether testing should be stopped, because the testing could
6 result in exculpatory information. Whether it will be able
7 to be used is the question.

8 MR. SEARS: I'm sorry. You are correct, Your
9 Honor.

10 THE COURT: So, I don't have any problem with
11 you going ahead with whatever testing you think needs to be
12 done, Mr. Butner, with regard to your case.

13 At this point I am not going to make any
14 opinion with regard to what test you do or what you -- if
15 it's just serological tests or enzymes or testing for DNA.
16 But my concern was that the other side be in the loop with
17 regard to items where the DNA tested is going to use up
18 everything that is possibly available. And if it is, to make
19 some provision for their people being able to look over the
20 shoulder and be able to critique the process that is being
21 conducted.

22 MR. BUTNER: Okay.

23 MR. HAMMOND: And Judge, just so -- and I
24 don't want to belabor this, but there is -- there are two
25 steps in this process. And where I think we may be about to

1 have a problem is that the first thing that has to happen, of
2 course, is that there has to be an extraction of the testable
3 sample. Well -- and then once you extract it, then you do
4 the DNA profiling.

5 But what happens -- and I think it may
6 already have happened at least one time here -- the
7 extraction process has resulted in the D.P.S. lab thinking
8 that they have extracted all of the available DNA that they
9 could find from a particular location. They may, in fact, be
10 wrong about that, or they may have done it in a way that
11 wasn't the best way to assure that there was a usable sample
12 that could be tested by both parties. But I think in the
13 minds of the people at D.P.S., they think there isn't a
14 consumption question until you get to actually running the
15 test itself. And I could see that confusion coming. I could
16 see it in a couple of the D.P.S. reports.

17 And it was, in part, with that in mind --
18 and that is why we showed you the tank top last time. I
19 believe if we were simply given a list of the things that
20 they intend to test, we could at least, preserving all of our
21 objections, we could say here is a place where we need to be
22 present. We need to be present if you are going to try to
23 extract DNA from X.

24 THE COURT: What are the issues with the State
25 complying with that kind of request?

1 MR. BUTNER: Judge, I don't think there are,
2 and that is what I was planning on doing, is giving him a
3 list. I have these things here. I am just trying to
4 associate them with Bates numbers and some of them don't have
5 Bates number, in which case I am saying to my Bates number
6 person -- give me the property evidence sheet that has a
7 Bates number, and that will cover those items.

8 MR. SEARS: Or sheriff department numbers.

9 MR. BUTNER: We have those.

10 THE COURT: To the extent that you can
11 identify it in some fashion that will allow the defense to
12 look on their materials and identify --

13 MR. BUTNER: Okay. Well, that makes it
14 easier, then, because the Bates number was partially a
15 problem. I am looking at them like I don't think we've got
16 Bates numbers for these things, but we have Bates numbers for
17 the sheets.

18 MR. HAMMOND: We can work with the sheriff's
19 identification number.

20 MR. SEARS: We have an index for that.

21 THE COURT: You have a cross index by both.

22 I would appreciate -- I understand what
23 the issue is, and I think that your understanding of my order
24 was accurate, and it seems as though Mr. Butner is engaged in
25 trying to provide you with that information. So I will

1 direct that he do so, if they are going to do some additional
2 testing, and do it in a timely fashion so that the decision
3 can be made. Refer the matter to an appropriate laboratory
4 other than D.P.S., if you are not going to be allowed to have
5 your experts in D.P.S.

6 MR. HAMMOND: And if it is going to be the
7 Sorenson Lab in Utah, we will have one of our people from
8 Phoenix attend. I would rather do it in Phoenix and have
9 someone from D.P.S. attend. We may save several thousand
10 dollars by the time that is over, but I would rather get this
11 phase done than worry about where it's done. As long as we
12 can be present, we will tolerate it.

13 THE COURT: Other items on the punch list?

14 MR. SEARS: That covers it. Thank you, Your
15 Honor. Thank you.

16 THE COURT: Your punch list, if you have one,
17 Mr. Butner.

18 MR. BUTNER: You know, it's amazing, but our
19 punch lists sort of cross each other, and I think that we
20 have discussed the things that I was going to bring to the
21 Court's attention, too.

22 THE COURT: Then I will vacate the hearing, if
23 I didn't already, on the 15th, and we will meet again on the
24 17th at 2:30.

25 MR. SEARS: Thank you, Your Honor.

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MR. BUTNER: Thank you, Judge.

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THE COURT: Stand in recess.

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(Whereupon, these proceedings were concluded.)

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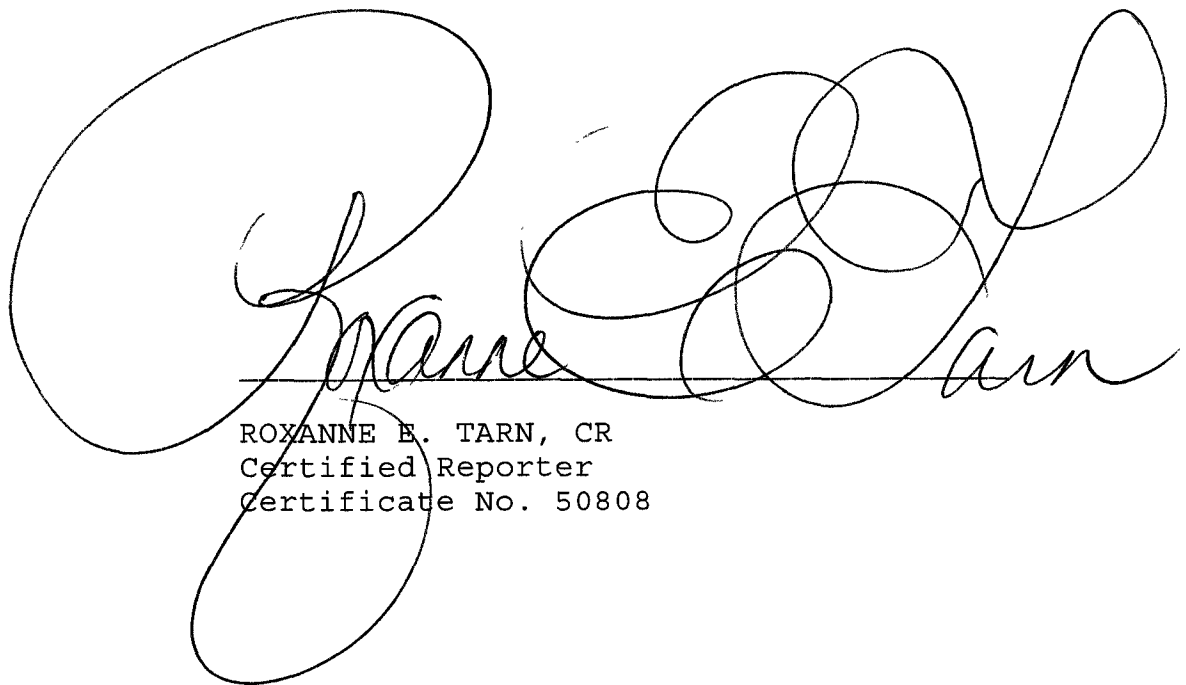
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 98 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 10th day of January,
2010.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808